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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-401

DWIGHT L. CHAPIN, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner Dwight L. Chapin respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion entered in this proceeding on July 14, 1975, by the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the Court of Appeals, dated July 14, 1975, is reported at 515 F.2d 1274. It is reprinted in the appendix hereto, p. 1a, *infra.*

JURISDICTION

The petitioner, following a jury trial, in the United States District Court for the District of Columbia (Gesell, J.), was convicted of two counts of making "false material declarations" before a grand jury in violation of 18 U.S.C. § 1623. On appeal, the Court of Appeals affirmed the conviction on both counts, its judgment being entered on July 14, 1975. See p. 17a, *infra*. The petitioner did not file any petition for rehearing.

On timely application, the Chief Justice, on August 8, 1975, extended the time for filing this petition to and including September 12, 1975. This petition has been filed within that extended period.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution under 18 U.S.C. § 1623 for having made "false material declarations" in responding to questions asked at a grand jury inquiry into national political campaign activities, the defendant may raise the defense that the questions, while containing no First Amendment overtones, were vague and imprecise.

2. Whether 18 U.S.C. § 1623 permits a charge or a conviction thereunder for having falsely answered ambiguous questions asked by a grand jury interrogator where:

(a) The defendant gave true answers to the questions as he interpreted the questions; but

(b) The jury finds that the answers are false by ascribing to the defendant an understanding of a

different and what to the jury is a more reasonable interpretation of the questions; and

(c) The grand jury interrogator never sought to ask more precise follow-up questions, and never testified as to what he meant as to the questions he did ask.

3. Whether, particularly in light of the unprecedent nation-wide publicity accompanying what is loosely called the Watergate affair, a former White House official can be given a fair trial in the District of Columbia during the height of such publicity on widely-publicized charges of perjury containing political and racial overtones.

4. Whether, in the setting of such a prosecution, the defendant is entitled on the *voir dire* to inquire as to the political affiliations and preferences of the prospective jurors.

STATUTE AND RULE INVOLVED

18 U.S.C. § 1623

§ 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall

not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Rule 21(a), Federal Rules of Criminal Procedure

(a) *For Prejudice in the District.* The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

STATEMENT OF THE CASE

A. Introduction

Dwight L. Chapin, the petitioner, was Appointments Secretary to President Nixon from 1969 to March of 1973. He has never been charged with any participation in the notorious Watergate incidents.

One of Chapin's functions at the White House was to participate in political activities on behalf of the President. In 1971, he conceived the idea of hiring someone to play "political pranks" on the various contenders for the Democratic Presidential nomination in 1972, as the court below stated (p. 2a, *infra*), "with the aim of creating so much dissension among the candidates that they would not be able to unite effectively behind the party's nominee after the convention." His idea received the approval of H. R. Haldeman, the White House Chief of Staff. To execute the plan, Chapin then arranged for the hiring of one Donald

Segretti, a college friend, and instructed him generally about the types of activities he was expected to engage in. The evidence is undisputed that such instructions constituted simply a "master plan" for sowing dissension, the details and execution being left entirely to Segretti. Chapin cautioned Segretti that he should do nothing illegal.

Segretti engaged in a series of disruptive activities during the last part of 1971 and the early part of 1972, including the printing and distributing of false and vicious press releases and letters concerning various Democratic contenders. Chapin never authorized or anticipated the distribution of such libelous material by Segretti. The court below stated (p. 3a, *infra*) that "it is undenied that Chapin had nothing to do with the exact 'pranks' to be played and saw none of the items mentioned above before Segretti used them," but that "it is also clear that the latter regularly sent copies of his output to Chapin at home and that Chapin was aware of at least these documents shortly after they were used."

On April 11, 1973, Chapin was called before a federal grand jury in the District of Columbia investigating the so-called "dirty tricks" that had been executed by Segretti. More specifically, the grand jury was inquiring whether Segretti and others had violated 18 U.S.C. § 612, punishing whoever "distributes or causes to be distributed" campaign statements without properly identifying the persons or groups responsible for them. At that time Segretti was not cooperating with the Government and had not supplied the details of his activities to any prosecuting agency. Segretti later appeared as a Government witness, however, at Chapin's trial .

On November 29, 1973, Chapin was indicted on four counts of having made "false material declarations" in his appearance before the grand jury, in violation of 18 U.S.C .§ 1623. That section is a relatively new one, having been enacted as a part of the Organized Crime Control Act of 1970.

Trial by jury began on April 1, 1974, in the District Court, Judge Gesell presiding. Count Four, which alleged that Chapin had testified falsely about his knowledge of the arrangements for paying Segretti, was dismissed by Judge Gesell at the end of the Government's case. And the jury, in returning its verdict on April 5, 1974, acquitted Chapin of Count Two, which dealt with his grand jury testimony concerning his advice to Segretti when the latter was called by the FBI.

The jury, on a special verdict, also acquitted Chapin on the first of the two "false material declarations" alleged in Count One. But the jury found Chapin guilty as to the second "declaration" contained in Count One, as well as to the single "declaration" contained in Count Three. Judge Gesell sentenced Chapin to two concurrent terms of from 10 to 30 months imprisonment. Chapin is currently serving that sentence.

On appeal, the Court of Appeals for the District of Columbia Circuit unanimously affirmed the conviction as found by the jury.

B. The Alleged "False Material Declarations"

The facts that are said to support the conviction are set forth in the opinion below and need not be repeated here. But it is essential to reiterate the alleged "false material declarations" for which Chapin stands convicted, and to contrast the opposing views of the defense and the Government respecting the vagueness of the declarations and the proof of their falsity. The declarations themselves consist of questions put to Chapin during the grand jury inquiry and Chapin's responses thereto. Both the questions and the responses appear below in bold face type.[1]

The Count One "declarations"

Count One alleged that Chapin made two false "declarations," but the jury found Chapin innocent of having falsified the first of them. Because the first "declaration" immediately precedes the second one in Chapin's grand jury colloquy and is intimately related to the second "declaration," the first question and response bear repetition:

> **Q. Did you ever discuss in any way with Mr. Segretti the distribution of any campaign literature or statement of any kind?**
>
> **A. No.**

That negative response, which the jury found truthful, was immediately followed by a question and answer that together constituted the "declaration" in Count One, which the jury found to be false:

> **Q. To your knowledge did Mr. Segretti ever distribute any statement of any kind, or any campaign literature of any kind?**
>
> **A. Not that I am familiar with.**

---

[1] The references herein to "App." are to the Joint Appendix filed in the court below.

Chapin's claims	*Government's claims*
Chapin claimed that the question was vague and ambiguous, since the word "distribute" is subject to a number of possible interpretations, i.e., it might mean (1) personal acts of distribution by Segretti himself, such as passing out the campaign literature on a street corner or from house to house; or (2) acts of distribution by others operating at the direction of Segretti.	The Government denied that the word "distribute" is inherently vague or ambiguous, that it simply means the act of making something "available to others." In support of that interpretation of the word, the Government cited Chapin's own definition of the word given in response to his counsel's question at trial as to what the word "distribution" means "with respect to advertising or campaign literature." App. 306. Chapin replied:
Chapin claimed that, at the time of his grand jury appearance, he understood the question to refer only to personal acts of distribution by Segretti. On that premise, even the court below acknowledged (p. 6a, *infra*) that Chapin's "not . . . familiar with" response was truthful. That truthfulness was found in Segretti's trial testimony. App. 197-198. As summarized in the opinion below (p. 6a, *infra*), "While Segretti testified at the trial that he actually had, contrary to Chapin's instructions, passed things out to 'consumers' directly, he also stated that he had not told Chapin of those instances, and there was no indication that Chapin had found out about them otherwise."	"The word 'distribution' means to me the method by which something goes from the point of production to the hands of the consumer. It deals with the channels by which it goes, the economics of how it is handled, how it is merchandized, that kind of a context."
	Thus the Government interpreted Chapin's grand jury response as a denial that he was aware that Segretti was by any method making the campaign literature available to others. On that premise, the Government argued that the evidence was clear that Chapin was fully aware that Segretti was involved in the

Chapin's claims	*Government's claims*
At the trial, Chapin testified that he was "not familiar with anything that Mr. Segretti distributed personally." App. 306.	printing and distribution of fictitious campaign literature among rival Democratic presidential hopefuls, having discussed it with him and received numerous samples of it. The evidence was also said to be clear that Chapin was aware of these activities at the time he testified before the grand jury; hence his response was false.
Chapin's understanding was consistent with the distinction in 18 U.S.C. § 612, toward which the question was asked, between one who "distributes" and one who "causes [material] to be distributed."	

The Count Three "declaration"

The "declaration" contained in Count Three, which the jury declared false, is found in Chapin s response to the following question:

> **Q. Did you ever express any interest to him [Segretti], or give him any directions or instructions with respect to any single or particular candidate?**
>
> **A. Not that I recall.**[2]

[2] The above question and answer came immediately after the following colloquy, which was also set forth in Count Three:

> Q. What candidates do you recall receiving information about-Senator Muskie—was he one?
>
> A. Yes. I think virtually Muskie and Humphrey, Wallace.
>
> Q. Senator McGovern?
>
> A. Jackson, McGovern. I think virtually all of them. I forget now who all the candidates were. I think that covers it.
>
> Q. At one time or another during this period of time, in the early months of 1972, you received information from Mr. Segretti relating to all these candidates?

[cont'd next page]

Chapin's claims	*Goverment's claims*
Chapin claimed that this was a two-part question, separated by the disjunctive "or." In Chapin's view, the Government never proved which part of the question Chapin responded to or intended to respond to. The Government, in cross-examining Chapin at the trial, did not ask him which part of the question he had in mind when he responded "Not that I recall."	The Government denied Chapin's claim that, if the question be deemed to be a two-part inquiry, the Government must prove that the response was false as to both parts. But even on the assumption that it was a two-part inquiry, the Government claimed that the evidence showed that Chapin's response was false as to both aspects of the question.
As to the first part of the question, Chapin claimed that the phrase "express any interest" was impermissibly vague and was subject to a number of possible interpretations. The phrase "give him any directions or instructions" in the second part of the question was also alleged to be vague.	When read as a whole and in the context of the immediately preceding questions (see footnote 2, below), said the Government, "this question very plainly asked whether Chapin ever gave Segretti any instructions about or expressed any interest in *specific* candidates, without reference to whether Chapin was telling him to ignore all others." Govt. Brief, p. 31.
The phrase "any single or particular candidate," which was common to both parts of the question, was said reasonably to mean one particular candidate to the exclusion of all others. And Chapin was said to have had that meaning in mind when	As proof that Chapin's response was false, the Government pointed to the testimony of Segretti that (1) at one of their early meetings, Chapin told him that "Senator Muskie was the

A. As I recall, two of them may be mentioned in one little note or something. But they were not documents or reports—what you and I would consider reports.

None of those statements was alleged to be false. They merely supply the context in which the allegedly false "declaration" was made.

Chapin's claims	*Government's claims*
he disclaimed recalling any interest or instructions with respect to a particular candidate, such as Senator Muskie. Segretti himself testified that the general purpose or master plan of his activities was to create dissension among all the Democratic candidates as a group, rather than to concentrate on any particular one. App. 101. Thus when, after a series of questions that referred to at least four of the candidates (see footnote 2, *supra*), Chapin was asked if he had expressed or if he had particularized his interests or instructions as to any one of them, Chapin had in mind "only that there was no master plan against any particular candidate that Mr. Segretti dealt with." App. 295. As the question was interpreted by Chapin, the Government did not prove that his response was false.	one that I should concern myself with primarily" (App. 105); (2) Chapin suggested that at a Nixon rally "it would be a good idea" to have a disheveled individual holding a "Muskie for President" sign (App. 113); and (3) in March of 1972, when Senator Muskie was no longer a front runner, Chapin told him "that I should concentrate my efforts towards fostering a split between the staff or the candidates of Senator Humphrey and Senator Muskie" (App. 165). See also opinion below, p. 8a, *infra*.
Indeed, the court below acknowledged (p. 8a, *infra*) "that if this were in fact the meaning Chapin had given to the question, his answer was true."	

C. The Charge to the Jury

On the issue of the falsity of Chapin's responses to the foregoing questions, and his intent in so responding, Judge Gesell charged the jury as follows (App. 328-329):

> As to the second element, you are instructed that in order to convict the Defendant of a particular charge, you must conclude beyond a reasonable doubt that the declaration you are considering was in fact false.
>
> A statement is false if you find it to be contrary to the facts as you find them. An answer to a question is not false if it is literally true and technically responsive. If the response was literally true, it makes no difference if it may have been incomplete or misleading.
>
> A declaration is literally true and not false if, no matter how narrowly or partially truthful, it responds to a reasonable interpretation of the question, if that interpretation could have been reasonably held by the person answering it at the time.
>
> It makes no difference that a truthful literal answer may or may not have been chosen to mislead or to avoid fuller disclosure.
>
> If a question is reasonably susceptible of two different interpretations, a response is not a false declaration unless it is shown beyond a reasonable doubt to be false under both possible reasonable interpretations of the question.
>
> You are not to isolate the particular questions and answers listed in the indictment from the context in which they appear. The meaning and thrust of the questions and of the answers must be judged in the light of the general course of the examination as a whole and particularly as it had proceeded to the point before the answer was given.
>
> Third, if a declaration is shown to be false beyond a reasonable doubt, the Defendant may not be found guilty unless it had also been shown beyond a reasonable doubt that the Defendant at the time he answered knew the answer to be false. This is basically a matter of what was in his mind, his intent. Did he know his answer was false? Did he act on purpose, wilfully, or did he act because of mistake, inadvertence or accident? By inadvertence, I mean to include carelessly or because of an inability, a genuine inability to remember.

No objections were made to the foregoing charge, and Chapin has made no claim that the charge, as far as it went, was in any way erroneous or inadequate. In its brief to the court below, the Government claimed (Brief, p. 23) that Judge Gesell, in the above quoted portions of the charge, erroneously gave Chapin a benefit to which he was not entitled—i.e., he charged "that, without regard to how the defendant actually understood the question, they should acquit him if his answer was a literally truthful response to *any* reasonable interpretation of the question."

Based upon the foregoing charge, the jury found that Chapin gave a true answer to the first question set forth in Count One, but that he gave false answers to the second question set forth in Count One and to the question set forth in Count Three.[3]

---

[3] Chapin argued in the court below (Brief, p. 13, note 2) that "the verdict pattern of acquittal and conviction on Count I is so mystifying and irreconcilable that as a matter of common sense it supports an entry of judgment for Chapin." If, as the jury found, Chapin truthfully said "no" when asked if he ever discussed in any way with Segretti the distribution of any campaign literature of any kind, how could his answer be false in denying knowledge that Segretti ever distributed such literature? Chapin was clearly never present when Segretti made a distribution. App. 198. Nor was there any evidence that Chapin ever learned from third parties about Segretti's distribution activities.

D. The Change of Venue Motion

Prior to trial and before the jury was selected, Chapin moved for a change of venue under Rule 21(a) of the Federal Rules of Criminal Procedure. This motion, which Judge Gesell denied, alleged that the case was so political in nature and that the pre-trial publicity was so prejudicial that Chapin could not get a fair trial in the District of Columbia, where the crime was committed.

As the court below recognized (p. 12a, *infra*), there were two distinct branches to Chapin's change of venue claim. The first, in the court's words, was that because of Chapin's "connection with the Nixon administration and his participation in a 'dirty tricks' campaign aimed at Democratic candidates and with racial overtones, a truly fair and impartial jury could not have been drawn from the District's heavily black, and overwhelmingly Democratic, population." To support that contention, Chapin offered an affidavit and testimony, at a pre-trial hearing, of Dr. Elvin Mackey, Jr., Director of Minority Group Program Development of the American Psychiatric Association. App. 38-54. To quote again from the opinion below (p. 12a, *infra*),

> "Dr. Mackey stated that, because the heavily-black District had been denied home rule and because of the Nixon administration's policy of 'benign neglect,' prospective black jurors would have a 'normal human reaction' of hostility toward the Nixon administration and those associated with it—coupled with a tendency to suppress such feelings when asked about them."

This documented claim was made at a time when the Government had already announced that it intended to offer at the trial highly inflammatory material prepared

by Segretti that would be politically offensive to Democrats and racially offensive to Blacks.

In denying this aspect of the venue motion, Judge Gesell remarked that Dr. Mackey's testimony, as well as the motion, was "in some respects an affront to the jury system." App. 57. He added that "the suggestion that juries do not rise to the standards that are expected of a good citizen in a community is just wrong . . . . and I have the utmost confidence that we can and will select in this case an impartial jury." App. 57. The Court of Appeals below agreed with Judge Gesell's sentiments, and added that "Chapin's role in both the administration and the wrongdoings in which it was engaged was small; testimony on his behalf at trial emphasized that his job was almost entirely administrative with no policy responsibilities," and that the crime with which Chapin was charged "was not, unlike that to which Segretti pled guilty, directly related to anti-Democratic activities." See p. 13a, *infra*. Moreover, said the court below, Dr. Mackey's testimony failed to take cognizance of the possibility "that there might be a distinction between a potential juror's feelings as to Richard Nixon himself and one of his minor functionaries," and of the fact "that, while there may be more blacks on District of Columbia juries than on juries in other federal district courts, juries in this city are not all black, and the jury in this case was in fact split almost evenly along racial lines." See p. 13a, *infra*.

The second branch of the venue motion was that the publicity about Chapin and his activities was so great that it was unlikely that any jury in the District of Columbia could put aside the resulting prejudice

against him and decide the case on the basis of the trial evidence. This claim, as Judge Gesell recognized (App. 55), was essentially "whether or not a fair trial can be given to this particular Defendant."

This second aspect of the venue claim stemmed in part from the evidence submitted as to the unprecedented publicity about the so-called Watergate affair, a national phenomenon to which Chapin's indictment was unfairly but effectively tied. Even Judge Gesell allowed this case to fall into the "Watergate syndrome". While he cautioned the prospective jurors that "there are no accusations made against Mr. Chapin which in any way involve him in the more prominent Watergate matters that you may have heard something about, such as the break-in in the Democratic Headquarters, or any kind of cover-up," he also advised them that this case was "one of a number of cases that has been brought by the Special Prosecutor arising out of what is very loosely called Watergate." See App. 61, 66.

Evidence was also submitted as to the extent of the prejudicial publicity that arose from the indictment of Chapin alone, particularly in the District of Columbia. Judge Gesell, in denying the venue motion, ruled that the issue was not the quantity of such publicity but the quality thereof. App. 56. In his words,

> "Certainly there is no indication that the publicity with respect to the events that have attracted national attention, of which this is a miniscule part, have had a single-minded, inflammatory, vitriolic or vicious aspect, such as were present in Sheppard, which counsel referred to. Every possible point of view, opinion, qualification about aspects of this case have been expressed frequently on the same page of the newspaper by different columnists or frequently as between the news article on the first page and the editorial on the inside. There is no common view about any aspect of this case that the Court, as a citizen, is aware of; and certainly no common view in the newspapers with respect to the matter." App. 56-57.

The Court of Appeals below added its own analysis of the pre-trial publicity about Chapin's case, relegating it to the status of an inside-page newspaper story. As the court put it (p. 15a, *infra*):

> "While appellant's upcoming trial attracted some newspaper attention, the articles were not front-page stories, frequently mentioned the trial only in passing, and a large number concentrated on John Dean's role as a witness rather than Chapin's role as defendant. Those stories which were exclusively about the trial were factual accounts of motions filed by the defendant and proceedings in open court. Editorial comment, to the extent there was any, was essentially sympathetic, deploring the possibility that of all the White House staff members, only Chapin, and not those more responsible for Watergate and the cover-up, was likely to be brought to trial and convicted. In addition, the publicity was at its height during January and February, 1974, and had decreased substantially by the time of trial in April. The Washington Post appears from the record to have carried no story about the trial the day it started."

Thus did the motion for change of venue die. While Chapin never requested that Judge Gesell consider the lesser remedy of granting a continuance to allow the publicity to die down, it was readily apparent that Judge Gesell preferred to rely on the *voir dire* as the

mechanism to uncover any prejudice that prospective jurors might have absorbed from the pre-trial publicity.

E. The Voir Dire Questions

As a part of Judge Gesell's *voir dire,* prospective jurors were asked whether they believed that their own connection or that of a close friend or relative with a political party, particularly during the 1972 Presidential campaign, would prejudice them for or against Chapin. They were also asked whether they or their relatives had worked in the 1972 campaign for the Committee to Reelect the President.

But Judge Gesell declined to ask nine questions submitted by Chapin's counsel, on the theory that the Constitution barred him from asking such questions. App. 90. Actually, one of the questions was asked by the court as a part of its own *voir dire.* But the Court of Appeals below found that six of the questions "might in fact raise First Amendment problems, in that they asked who jurors had voted for, which political parties they had contributed to, worked for, etc." See p. 16a, *infra.* Those six questions were (App. 59):

1. Has anyone made a contribution to a political party in the last four years and, if so, to which party?
4. Has anyone or a relative worked or performed services for a political candidate in the last ten years?
5. Has anyone voted in any election or primary for George McGovern, Edmund Muskie, Hubert Humphrey, Shirley Chisholm or Henry Jackson?
6. Has anyone voted for Walter Fauntroy for any office?

7. Has anyone been a registered Democrat for any one of the past four years?
8. Has anyone been a registered Republican for any one of the past four years?

The court below stated that, because of modern election laws, the questions numbered 7 and 8, which were the only two emphasized on the appeal, "should have been asked." Voter registration lists in the District of Columbia are public and are accessible, and thus "the constitutional basis for denial of these particular [two] questions is not as clear as for the others." See p. 17a, *infra.*

But the Court of Appeals concluded that Judge Gesell did not abuse his discretion in declining to ask questions 7 and 8 since (1) they were buried in a list of much more questionable ones, (2) Chapin's counsel, when faced with Judge Gesell's constitutional reason for denying all the questions, did not single out Nos. 7 and 8 as constitutionally permissible, and (3) there was a substantial *voir dire* on political bias and prejudice. See p. 17a, *infra.*

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Important Problems Are Raised Under a New Statute, 18 U.S.C. § 1623, as to the Extent to Which the Vagueness or Ambiguity of the Inquiries Establishes a Defense to a Charge of Having Made "False Material Declarations"

This case affords the first opportunity for this Court to chart the contours of a new, important and potentially confusing federal perjury statute, 18 U.S.C. § 1623.

That statute, enacted in 1970 as a part of the Organized Crime Control Act, is a far-reaching addition to the perjury laws of the United States, expressly de-

signed to circumvent the two-witness rule that adheres to the general perjury statute, 18 U.S.C. § 1621.[4] In effect, the new § 1623 abolishes the two-witness rule as to perjury committed before "any court or grand jury of the United States," and leaves the two-witness rule to be applied under § 1621 as to perjury committed before any other competent tribunal, officer or person "in any case in which a law of the United States authorizes an oath to be administered."

Under any circumstances, a "perjury statute is not to be loosely construed." *Bronston* v. *United States*, 409 U.S. 352, 360 (1973). But particularly because this perjury statute, § 1623, has abolished the traditional safeguards of the two-witness rule, the construction accorded it should be carefully limited so that the lack of the "questioner's acuity" does not become the basis of a federal perjury prosecution. *Ibid,* 362. It is essential that federal courts, grand juries, prosecutors and prospective witnesses know precisely what can be found, under the relaxed standard of proof, to be a "false material declaration" within the scope of § 1623. Guidance from this Court is especially desirable at this early date, before § 1623 becomes encrusted with the confusion and conflict that have surrounded much of the history of § 1621. The new statute, in short, needs authoritative delineation during its formative years.

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[4] Like § 1621, the new § 1623 is a part of Chapter 79 of the Criminal Code, which is entitled "Perjury." Subsection (e) of § 1623 states that proof beyond a reasonable doubt is sufficient for conviction under § 1623 and that it "shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence." In contrast, of course, a conviction cannot be had for perjury under § 1621 "on the uncorroborated oath of a single witness." *Weiler* v. *United States,* 323 U.S. 606, 611 (1945).

The opinion below has injected into § 1623 some of the doctrines and precedents established under the older § 1621. Obviously, not all of those doctrines and precedents are irrelevant to § 1623, but some of them, unfortunately, are confusing, contradictory and dubious. It would be unfortunate if § 1623 were to be tarred with such litigious ambiguities as are evident in the opinion below.

An appropriate vehicle for avoiding that result can be found by reviewing the opinion below. The opinion of the District of Columbia Circuit marks the first significant attempt by an appellate court to deal comprehensively with the critical perjury components of § 1623. And the opinion has been rendered by a court before whom recur many of the most significant perjury prosecutions in the country.

The problems and questions that arise from the opinion below must, at the outset, be viewed in light of the particular way in which the "false material declarations" were uttered by the petitioner Chapin His declarations did not take the form of his own simple declaratory statements, from the four corners of which could be deduced his truthfulness, his understanding and his intent. Rather, his declarations took the form of two short responses to questions: (1) "Not that I am familiar with," and (2) "Not that I recall." The truthfulness of those responses, of course, can be assessed only if the interrogator's questions are incorporated into the responses. Indeed, the questions themselves become, for most purposes, the critical features of the "false material declarations" and lead to the important problems and questions in this case. Such problems that stem from the questions are those that this Court adverted to but found unnecessary to decide,

in the setting of a § 1621 prosecution, in *Bronston* v. *United States,* 409 U.S. 352, 356-357 (1973).[5]

Within the foregoing context, the following questions are apparent from the opinion below, questions that fully justify the grant of certiorari in this case:

(1) To what extent can vagueness and ambiguity in the questions asked of a witness establish a defense to a § 1623 charge of making a "false material declaration?" That perhaps is the basic question left unanswered by this Court in *Bronston* with reference to § 1621, and it is a question that now needs to be answered with reference to § 1623. The court below, citing a § 1621 case,[6] stated that such a defense was limited to questions of an ambiguous nature that have First Amendment overtones, though it conceded that there may be "some questions without First Amendment overtones . . . so vague as to prohibit the government from even attempting to prove that the defendant answered falsely." See pp. 4a-5a, *infra.* This case presents the unresolved question whether the defense of impreciseness also goes to questions that have obvious political overtones.

(2) Does the fact that the vagueness of a question becomes apparent only "when subjected to ingenious

[5] In *Bronston,* this Court held that § 1621 does not permit a conviction of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication. The Court stated, however, that "The problem of the ambiguity of the question is not free from doubt, but we need not reach that issue." 409 U.S. at 356.

[6] The court below stated that it could find only one case, involving § 1621, in which a perjury indictment was dismissed for vagueness in the question. That case is *United States* v. *Lattimore,* 127 F.Supp. 405, 409 (D.C.D.C. 1955), aff'd by equally divided court, 232 F.2d 334 (App. D.C. 1955). The questions there were both vague and highly charged with First Amendment problems.

scrutiny after the fact" operate to destroy the existence of vagueness? The affirmative answer given by the court below to that query (p. 5a, *infra*) is at best dubious. Why should such an after-the-fact scrutiny be deemed impermissible if a true ambiguity comes to light? Can it be that the obligation to uncover the ambiguity is that of the witness, appearing at a grand jury hearing without counsel and making on-the-spot scrutinies? How else can an ambiguity be detected other than after-the-fact?

(3) If such after-the-fact scrutinies are barred, is it enough to say that the imprecise questions are "subject to a reasonable and definite interpretation by the jury"? Answering that query in the affirmative (p. 5a, *infra*), the court below cited another § 1621 case that held that while certain words may connote different meanings in different situations, if they are "precisely defined in dictionaries" and are "terms of common usage" they become subject to "a reasonable and definite interpretation by the jury." *United States* v. *Marchisio,* 344 F.2d 653, 661-662 (C.A. 2, 1965). Does that mean, then, that a jury must retire to its deliberations armed with a dictionary and a thesaurus? Or is a jury supposed to speculate as to the precise definition of the words used? Or is it supposed to rely on some "ingenious scrutiny after the fact" supplied by witnesses, counsel or the court? This Court said in *Bronston,* 409 U.S. at 359, that a jury "should not be permitted to engage in conjecture whether an unresponsive answer . . . was intended to mislead or divert the examiner." Why, then, should it be permitted to engage in conjecture as to which of several dictionary meanings was really attached to the words used in the examiner's question?

(4) Can a jury be allowed to determine from extrinsic evidence what the defendant subjectively understood was in the interrogator's mind? Is § 1623, with its abolition of the two-witness rule, to be applied so that a jury can simply ascribe to the defendant an understanding that he did not in fact have, thereby making the jury's opinion a substitute for the interrogator's obligation to ask more precise follow-up questions?

(5) If an ambiguity does lie within a question, why does it not become the obligation of the Government to prove what meaning the interrogator intended to attach to the question? The court below did not address itself to that problem. But the Fifth Circuit in *Van Liew* v. *United States,* 321 F.2d 674, 682-683 (C.A. 5, 1963), has held that there is just such an obligation where two plausible interpetations can be placed on what the interrogator meant in asking the question. As the court there said:

> "Assuming that perjury could nonetheless be committed in such context, the deficiency of the proof here is demonstrated by considering what the Government would have to establish in that setting. It would have to establish that (a) the interrogator used the words with the meaning intended by the Government, and that (b) the swearer knew (i) the sense in which the interrogator used the words and (ii) nevertheless intentionally gave an answer which he knew to be false to the question as thus put in the sense thus intended."

The *Van Liew* decision cannot be squared with the result reached in this case.

(6) Indeed, why should a perjury prosecution be permitted under either § 1621 or § 1623 if the interrogator asks a question that is subject to various reasonable interpretations? Is not a governmental examiner under an obligation, for purposes of applying these perjury statutes, to ask precise questions that admit of no doubt as to what is being asked? In *Bronston,* this Court unanimously held that "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry" and that "Precise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 360, 362. Those holdings would seem to outlaw the ambiguous and imprecise question as a predicate for a perjury prosecution under § 1621 or § 1623. Otherwise, it becomes grossly unfair and unjust to convict a defendant because he misunderstood which of several meanings the interrogator attached to his question, or made a wrong guess as to which of several meanings the jury later thinks is the most reasonable interpretation. The defendant is left in an impossible situation, for it is impossible to defend one's actions against another man's interpretations.

What the Sixth Circuit said in *Wall* v. *United States,* 371 F.2d 398, 399-400 (C.A. 6, 1967), would appear equally applicable here:

> "The trouble with this case is that the question upon which the perjury charge was based, was inarticulately phrased, and, as admitted by the prosecution [not true in the instant case], was susceptible of two different interpetations. In our opinion, no charge of perjury can be based upon an answer to such a question."

See also *Smith* v. *United States,* 169 F.2d 118 (C.A. 6, 1948); *Galanos* v. *United States,* 49 F.2d 898 (C.A. 6, 1931), both cited in the *Wall* decision.[7]

The instant case is a perfect example of premising a perjury conviction on imprecise questioning, no attempt having been made to ask more precise follow-up questions. The interrogator could easily have asked Chapin the precise questions which the Government and the jury now say Chapin should have understood were being asked. For example:

(a) If the interrogator did not mean to ask whether Chapin knew of any personal distribution of political material by Segretti, as Chapin understood, the interrogator could simply have asked the precise question whether he knew if Segretti had ever directed others to distribute such material. In so doing, the interrogator would have been tracking the clear and precise distinction drawn by the very statute underlying the grand jury inquiry, 18 U.S.C. § 612. That statute expressly draws a line between one who "distributes" political material and one who "causes [material] to be . . . distributed."

(b) If the interrogator was really interested in Chapin's instructions about particular candidates, he

[7] The *Wall* case, which arose under § 1621, was distinguished by the court below on its particular facts (pp. 5a-6a, *infra*):

> "In Wall, the interpretation argued for by the defendant was in fact more reasonable and usual than that urged by the government. The defendant had answered 'I have not.' to the question 'Have you ever been on trips with Mr. X?' The evidence showed that, while Wall had been in Florida with Mr. X, she had not travelled with him to Florida. Since the government did not prove that Wall interpreted the question when it was asked in the first sense rather than the more usual second meaning, the conviction was reversed."

could simply have asked about Senator Muskie or Senator Humphrey by name. Instead, his compound question, with its emphasis on some unnamed "single or particular candidate," misled Chapin into thinking that the inquiry was whether the general master plan of causing dissension among all Democratic candidates hod somehow changed into a general plan of causing embarrassment to some particular candidate, to the exclusion of his competitors. Had there been precise follow-up questions, the interrogator would have elicited the precise information he apparently was seeking.

The record thus squarely presents the question whether § 1623 is to be applied so as to make imprecision in the questions the predicate of a perjury prosecution.

2. Important Problems Are Raised as to Whether a Former White House Official Can Get a Fair Trial in the District of Columbia during the Watergate Era on Widely Publicized Perjury Charges, Containing Political, Racial and Watergate Overtones.

This case presents unprecedented, important and troublesome problems in the administration of criminal justice in the federal courts, particularly those in the District of Columbia. These are problems that are likely to come again before the Court if and when those directly involved in the Watergate crimes seek review of their convictions.

(1) The critical problem that needs consideration by this Court is whether any official in the Nixon Administration, and especially one who served on the White House staff, could obtain a fair trial on any charge brought in the District of Columbia during the height of the Watergate crisis in 1974. It is a prob-

lem epitomized by Judge Gesell's reminder to the prospective jurors that the instant case, though divorced from direct involvement in the Watergate scandal, was "one of a number of cases that has been brought by the Special Prosecutor arising out of what is loosely called Watergate." See App. 61, 66.[8]

This problem rises above and beyond the normal considerations that prompted the court below to dismiss Chapin's objection—i.e., the lack of any overt prejudice, the minimal and seemingly fair-handed press coverage of the instant proceeding, and the extensive *voir dire* on matters of bias and prejudice. And it is not a problem to be solved by reference to the prior decisions of this Court that have established standards, constitutional and otherwise, for dealing with individualized and localized instances of flamboyant prejudicial publicity. See, e.g., *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965). Thus the reference by the court below to *Beck* v. *Washington,* 369 U.S. 541 (1962), is not very helpful, for that decision was premised solely on Fourteenth Amendment considerations and did not deal with anything like the pervasive and subtle psychological impact of "what is loosely called Watergate" on the national conscience. Part of that impact was necessarily expended upon the conceptions and attitudes of those citizens chosen for jury duty in the District of Columbia. That impact simply defies capture within

[8] The flood of Watergate publicity was so intense, particularly in the District of Columbia, that Attorney General Richardson and Special Prosecutor Cox publicly expressed fear that such publicity would likely create jury preconceptions about pending criminal cases. New York Times, June 5, 1973, at 26. The instant case became such a "pending case" on November 29, 1973, when the indictment was returned. The trial began on April 1, 1974.

the conventional norms for assessing undue influence upon jurors; it can be perceived only through a judicial notice and appreciation of the universality of the thrust of Watergate. If there was jury prejudice here, it was an inherent prejudice stemming from the totality of the Watergate publicity.

But the answer, if there be one, must be found within the unique jurisdiction of this Court. As most recently articulated last term by the Chief Justice, that jurisdiction authorizes "the exercise of our supervisory powers" over lower federal courts. *Murphy* v. *Florida,* No. 74-5116, 43 U.S. Law Week 4730, 4733 (June 16, 1975, concurring opinion).[9] Those powers of supervision incorporate but go beyond ordering compliance with the constitutional standards of a fair trial. Proceedings may be halted or transferred or dismissed, in the exercise of this Court's powers, because of what the Court deems to be inherent prejudice or unfairness below the level of constitutional violations.

These powers, then, are largely resident in this Court, permitting this Court to determine whether, because of inherent prejudice in the District of Colum-

[9] In *Murphy,* a state court jury had been exposed to information about the notorious defendant's prior convictions and about the crime for which he was being tried. His flamboyant life style and his numerous arrests had drawn extensive press coverage over a period of years. This Court held that his constitutional right to a fair trial had not been violated, since the *voir dire* showed no hostility to the defendant and since, in the totality of circumstances, no *inherent or actual prejudice* was evident.

The Chief Justice concurred only because the circumstances did not rise to the level of a Fourteenth Amendment due process violation. But he stated that "I would not hestitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case." 43 U.S. Law Week at 4733.

bia, such a trial as Chapin's should have been removed to another federal jurisdiction or delayed until the Watergate phenomena receded with the Presidential resignation in August of 1974. Those are the powers of supervision that the petitioner here asks that this Court invoke. See *Marshall* v. *United States,* 360 U.S. 310, 313 (1959).

(2) A related problem posed by the decision below concerns the denial of the change in venue claim, presented under Criminal Rule 21(a), that because of Chapin's "connection with the Nixon administration and his participation in a 'dirty tricks' campaign aimed at Democratic candidates and with racial overtones, a truly fair and impartial jury could not have been drawn from the District's heavily black, and overwhelmingly Democratic, population." See opinion below, p. 12a, *infra.* This claim was bolstered not only by testimony but by the expressed intent of the prosecution to introduce at the trial the blatantly racist and highly partisan material fabricated by Segretti. That material, which was in fact introduced, could only have had a prejudicial impact on jurors chosen from the District of Columbia.

Here again, the normal rules for assessing jury prejudice cannot be applied. The problem must be considered a component of those that are involved in the exercise of this Court's supervisory powers over the federal courts. Particularly is that so since Chapin's employment at the White House and his alleged connection with Segretti's vicious and racist distributions were undoubtedly why this case became in the jurors' minds a part of "what is loosely called Watergate."

(3) Finally, the decision below raises a significant problem reserved by this Court some 80 years ago in *Connors* v. *United States,* 158 U.S. 408 (1895). The Court there held that it was within the discretion of a federal trial judge to disallow a *voir dire* question concerning the juror's "political affiliations or party predilections" unless "there was some special reason or ground for putting that question to particular jurors called into the jury box for examination." Because "no such exceptional circumstances are disclosed by the record," the Court approved the trial judge's actions, but without further defining what "exceptional circumstances" would justify such a *voir dire* question. 158 U.S. at 415.[10]

The refusal of Judge Gesell, on constitutional grounds, to question the prospective jurors as to their affiliations with the Republican or Democratic parties directly poses the *Connors* question. In the context of this case, are there what the *Connors* decision called "exceptional circumstances" requiring the asking of such political questions? Do the factors here involved, such as the Watergate-related aspect of this case, the partisan political nature of the Segretti material, and the other political overtones of this prosecution, constitute "exceptional circumstances" within the intent of the *Connors* ruling? Are there First Amendment or other constitutional reasons for barring such questions?

The court below practically conceded that the two political affiliation questions "should have been asked," because "of changes in election laws since *Connors.*" See p. 16a, *infra.* Those changes have opened voter

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[10] The *Connors* case concerned a charge that the defendant had violated a federal law by carrying away and secreting a ballot box used in an election of a United States Representative.

registration lists to public scrutiny, thus diluting in the view of the court below "the constitutional basis for denial of these particular questions." See p. 17a, *infra*.

Clearly, the likely recurring nature of such *voir dire* questions, as well as the impact of the constitutional considerations on the *Connors* "exceptional circumstances" concept, are matters that support the grant of certiorari on this question. The appropriateness of a grant is in no way lessened by the lower court's avoidance of the problem by reference to the two political questions being "buried in a list of much more questionable ones" and to the "substantial *voir dire* on political bias and prejudice." Reliance on those circumstances only exacerbates the importance of the basic *Connors* problem and the need for a definitive resolution by this Court.

CONCLUSION

For the foregoing reasons, this petition should be granted. Unless this conviction is reviewed, the decision below will remain as a disturbing comprehensive precedent for a loose application of § 1623. And it will then leave a lasting question whether a fair trial can truly be had for one who was only peripherally involved in a highly emotional political crisis unprecedented in the nation's history.

Respectfully submitted,

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Counsel for Petitioner

September 12, 1975

APPENDIX

UNITED STATES of America

v.

Dwight L. CHAPIN, Appellant.

No. 74-1648.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 7, 1975.

Decided July 14, 1975.

Defendant was convicted before the United States District Court for District of Columbia, Gerhard A. Gesell, J., of making false material declarations before grand jury investigating "dirty tricks" during a presidential campaign, and he appealed. The Court of Appeals, Davis, J., held that questions asked defendant were subject to a reasonable and definite interpretation by grand jury, that there was no abuse of discretion in admitting into evidence various documents used in connection with "dirty tricks" activities, that nature of case and pretrial publicity did not require change of venue, and that refusal to ask voir dire questions concerning voter registration of potential jurors over past four years did not constitute an abuse of discretion.

Affirmed.

Appeal from the United States District Court for the District of Columbia (D.C. Criminal No. 990-73).

Jacob Stein, Washington, D. C., with whom Gerard E. Mitchell, Washington, D. C., was on the brief for appellant.

Richard D. Weinberg, Asst. Sp. Prosecutor, with whom Leon Jaworski, Sp. Prosecutor, at the time the brief was filed, Philip A. Lacovara, Counsel to the Sp. Prosecutor, at the time the brief was filed and Richard J. Davis, Asst. Sp. Prosecutor, was on the brief for appellee.

Before WRIGHT and LEVENTHAL, Circuit Judges, and DAVIS,* Judge.

Opinion for the Court filed by Judge DAVIS.

DAVIS, Judge:

Following a jury trial, appellant Dwight L. Chapin was convicted of two counts of making "false material declarations", 18 U.S.C. § 1623 (1970), before the grand jury investigating "dirty tricks" engaged in by Donald Segretti on behalf of President Nixon during the 1972 Presidential campaign. Specifically, appellant was convicted of falsely stating that he was not "familiar with" any distribution of campaign literature by Segretti, and that he did not recall "express[ing] any interest . . . or giv[ing Segretti] any directions or instructions with respect to any single or particular candidate."[1] The Govern-

* Of the United States Court of Claims, sitting by designation pursuant to 28 U.S.C. § 293(a) (1970).

1. Chapin was also indicted for testifying falsely as to his knowledge of the arrangements for paying Segretti, and his advice to Segretti when the latter was called by the FBI. The trial court dismissed the financing count at the close of the government's case, and the jury acquitted Chapin on the FBI count. The jury

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ment's contention, which the jury accepted, was that appellant did in fact know of distributions of literature by Segretti, was aware of this knowledge when he testified before the grand jury, and yet falsely responded that he was not familiar with any such distribution. On the second count on which appellant was convicted, the prosecution theory was that Chapin had given Segretti specific instructions about Senator Edmund Muskie, that Chapin understood the question to refer to such instructions, and remembered at the time of his grand jury appearance having given such instructions. On appeal, appellant claims that the "distribution" question was vague, and that he answered it truthfully because he was not in fact familiar with any "personal distribution" by Segretti, in the sense of passing out literature on street corners. Chapin also asserts that the second question was compound and therefore improper and likewise vague, and that again he answered truthfully in that he never gave directions about one candidate to the exclusion of all others. Appellant also claims error in the trial court's admission of certain evidence and that court's failure to grant a change of venue or to conduct a thorough enough voir dire.[2]

I.

Chapin was Appointments Secretary to President Nixon from the start of the President's term in January 1969 until March 1973. While his duties in that position were largely administrative, he also participated in political activities, particularly during the President's 1970 campaign for Congressional candidates. In 1971, Chapin conceived the idea of hiring someone to play "political pranks" on the various contenders for the Democratic Presidential nomination for 1972, with the aim of creating so much dissension among the candidates that they would not be able to unite effectively behind the party's nominee after the convention. The proposal received the approval of White House Chief of Staff H. R. Haldeman, who insisted however that no such activities be traceable back to the White House. Armed with Haldeman's approval, in the summer of 1971 Chapin hired Donald Segretti, a college friend just leaving the Army Judge Advocate Corps, for this job. Chapin instructed Segretti about the types of activities he was to engage in, using examples of having a train pull out of the station while a candidate was still talking and distributing false baggage calls, and warned him to do as little as possible himself and to use false names so as not to have his work attributable to the White House.

During the last part of 1971 and the first half of 1972, Segretti engaged in such disruptive activities as printing and distributing large posters saying "Help Muskie Support Bussing (sic) More Children Now," supposedly distributed by the Mothers Backing Muskie Committee; writing a letter on Citizens for Muskie stationery accusing Senator Jackson of being a homosexual and Senator Humphrey of cavorting with prostitutes at the expense of lobbyists; and putting out a "Humphrey" press release stating that Representative Shirley Chisholm

also acquitted Chapin on a subpart of the "distribution" count in which it was alleged that defendant falsely stated that he had not discussed with Segretti the distribution of campaign literature.

2. Chapin was sentenced to two concurrent terms of from ten to thirty months imprisonment.

had been committed to a mental institution in the early 1950's after being detained in Richmond, Virginia as a transvestite and that she was still under psychiatric care. While it is undenied that Chapin had nothing to do with the exact "pranks" to be played and saw none of the items mentioned above before Segretti used them, it is also clear that the latter regularly sent copies of his output to Chapin at home and that Chapin was aware of at least these documents shortly after they were used.

After the burglary at the Democratic National Committee headquarters in the Watergate office building was discovered on June 17, 1972, Chapin immediately instructed Segretti to cease his activities and to "get lost." The Segretti-Chapin project had been conducted solely out of the White House and not from the Committee to Reelect the President, the home base of the "Watergate" burglars. However, Segretti's activities had induced G. Gordon Liddy, one of those arrested in connection with the Watergate break-in, to check him out, and as a result Liddy's address book contained Segretti's name. In late June, Segretti was interviewed by the FBI. On the advice of John Dean, Counsel to the President, Segretti discussed generally what he had been doing but did not disclose that Chapin had hired him. In August 1972, Segretti was called before the Watergate grand jury. As with the FBI interview, on Dean's advice he attempted to avoid naming Chapin as his employer. However, in response to a question by a juror, Segretti admitted that he had been retained by Chapin. Chapin was concerned about his possible legal liability for Segretti's activities and consulted with Dean who thought Chapin's only "problem" would be with the federal campaign act provisions on attribution of campaign literature. Newspaper reports of Chapin's connection with Segretti were published beginning October 10, 1972, but were denied by the White House. Segretti was indicted in May 1973 for distributing the Jackson-Humphrey "sex letter" without proper attribution.

Between August 1972 and February 1973, Chapin was himself interviewed three times by the FBI concerning his relationship with Segretti. According to the testimony of the agent who saw him, Chapin admitted knowledge of some of Segretti's more minor "antics", but denied ever receiving any of the latter's documents and denied knowing, before the FBI began its investigation of Segretti, that Segretti had published false information about various candidates. Chapin testified at the trial that his denials were in fact false, but that he had been less than truthful because he was concerned, particularly at the time of the February meeting, that FBI interviews were being leaked to the press.

In April 1973, John Dean began talking to the Watergate prosecutors about the burglary itself and attempts to cover up both that episode and some earlier activities on behalf of the President. On April 11, 1973, Chapin appeared before the grand jury investigating campaign law violations. Questioning centered around Segretti's activities, the role of people in the White House in sponsoring and approving what Segretti had done, and how Segretti was paid and by whom. Chapin testified that he had gone into the grand jury intending to keep secret the fact that Haldeman had approved the plan, but denied any intent to limit his testimony on any other aspect of the inquiry. Under prodding, Chapin did eventually reveal Haldeman's role. However, appellant stands convict-

ed of falsely answering questions in two other areas. He was found guilty of giving the untrue responses emphasized in the following exchanges:

1. Q. To your knowledge did Mr. Segretti ever distribute any statements of any kind, or any kind, or any campaign literature of any kind?

   A. *Not that I am familiar with.*

2. Q. What candidates do you recall receiving information about? Senator Muskie—was he one?

   A. Yes. I think virtually Muskie and Humphrey, Wallace.

   Q. Senator McGovern?

   A. Jackson, McGovern. I think virtually all of them. I forget now who all the candidates were. I think that covers it.

   Q. At one time or another during this period of time, in the early months of 1972, you received information from Mr. Segretti relating to all these candidates?

   A. As I recall, two of them may be mentioned in one little note or something. But they were not documents or reports—what you and I would consider reports.

   Q. Did you ever express any interest to him, or give him any directions or instructions with respect to any single or particular candidate?

   A. *Not that I recall.*

II.

Appellant's first argument for reversal is that the two questions form improper bases for a perjury indictment in that they are so vague and ambiguous that only "[b]y groundless surmise . . . could the jury determine which definition [of the crucial words] defendant had in mind" when he responded. United States v. Lattimore, 127 F.Supp. 405, 409 (D.D.C.), aff'd, 98 U.S.App.D.C. 77, 232 F.2d 334 (1955). Specifically, appellant claims that the words "distribute" and "express any interest" are subject to a number of possible interpretations, any one of which someone in Chapin's position might have reasonably understood to be that the questioner intended. Since, appellant contends, a proper perjury prosecution requires that the government prove that the defendant knowingly answered falsely the question as he understood it, a vague question requires too much speculation by the jury as to the meaning the accused gave it when he answered.

The *Lattimore* case is the only one we have seen in which a perjury indictment was dismissed for vagueness in the question (and the dismissal upheld on appeal) —appellant's other cases go to the government's failure to prove which meaning was in the defendant's mind while conceding that, on proper proof, the convictions could have stood up. *See* United States v. Wall, 371 F.2d 398, 400 (6th Cir. 1967); United States v. Diogo, 320 F.2d 898, 907 (2d Cir. 1963). *Lattimore* involved extreme questions which were both vague and highly charged with First Amendment problems. No one would doubt that proceeding against someone for falsely stating that he was not a "sympathizer or any other kind of promoter of Communism or Communist interests" or a "follower of the Communist line," particularly in an era when the definition of Communist was expanded in the eyes of many, raised the most serious of First Amendment issues—having as it does, a close relationship to prosecuting that person for holding political beliefs. *Cf.* Dennis v. United States, 341 U.S. 494, 501–02, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) (plurality opinion).

While it may be that some questions without First Amendment overtones may be so vague as to prohibit the government from even attempting to prove that the defendant knowingly answered falsely, the words of which defendant complains here do not fall into that category. As another court stated when faced with the charge that "met with" and "regular" were too vague, "mere vagueness or ambiguity in the questions is not enough to establish a defense to perjury. Almost any question or answer can be interpreted in several ways when subjected to ingenious scrutiny after the fact." United States v. Ceccerelli, 350 F.Supp. 475, 478 (W.D. Penn.1972); *see* United States v. Lattimore, *supra*, 127 F.Supp. at 410 n. 21. When the questions involved here are considered in the context of both the purpose of the grand jury investigation, which was known to Chapin, and the series of questions actually asked, we cannot say that the words involved could not be "subject to a reasonable and definite interpretation by the jury." United States v. Marchisio, 344 F.2d 653, 662 (2d Cir. 1965).[3]

Next, defendant says that, even if the questions were sufficiently definite to support an indictment, the evidence was inadequate to prove that Chapin falsely answered the questions as he understood them. The charge instructed that the defendant could not be found guilty "unless it has also been shown beyond a reasonable doubt that the Defendant at the time he answered knew the answer to be false. This is basically a matter of what was in his mind, his intent." (Tr. 742)[4] Three preliminary observations are appropriate. First, appellant received the benefit of a jury charge based on the so-called objective theory of perjury—that, if the answer he gave was true under any reasonable interpretation of the question, the jury could not convict. We need not decide, therefore, whether a conviction would be upheld if the government proved that the defendant was truthfully answering some possible-and-reasonable interpretation of the question but falsely answering the question as he himself interpreted it.

Second, the possibility that a question or an answer may have a number of interpretations does not invalidate either an indictment or a conviction after a jury charge which, as here, requires the jury to determine that the question *as the defendant understood it* was falsely answered in order to convict. Despite appellant's argument, the *Wall* and *Bronston* cases are not contrary. In *Wall,* the interpretation argued for by the defendant was in fact more reasonable and usual than that urged by the government. The defendant had answered "I have not." to the question "Have you ever been on trips with Mr. X?" The evidence showed that, while

3. See the following decisions in which questions challenged as ambiguous were upheld as sufficient to support an indictment or a conviction. Seymour v. United States, 77 F.2d 577 (8th Cir. 1935) ("encouraging the candidacy"; defendant contended he interpreted the question as asking whether he had personally influenced the candidacy, which he had not; conviction sustained); United States v. Larocca, 245 F.2d 196 (2d Cir. 1957) ("anything to do with this business"; indictment reinstated); United States v. Bergman, 354 F.2d 931 (2d Cir. 1966) ("kickback"; conviction sustained although evidence showed kickback not paid directly to defendant).

4. No part of the charge-to-the-jury is challenged on this appeal.

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Wall had been in Florida with Mr. X, she had not travelled with him to Florida. Since the government did not prove that Wall interpreted the question when it was asked in the first sense rather than the more usual second meaning, the conviction was reversed. United States v. Wall, *supra*, 371 F.2d at 400. In *Bronston*, the Court dealt with a statement literally true but unresponsive to the question asked. The Court explicitly considered only the problem posed by a declarative statement which was true no matter what the question might have meant, and did not consider the effect of any possible vagueness of the question. Bronston v. United States, 409 U.S. 352, 356–57, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). *Bronston* does not deal with the situation where a defendant has given a "yes or no" answer, the truth of which can be ascertained only in the context of the question posed.

Third, perjury cases, like all criminal cases, are susceptible to proof by circumstantial evidence, and in fact are peculiarly likely to be proven in this manner because one of the elements of the crime is that the defendant knew his statement was false when he made it. *See* Young v. United States, 94 U.S.App. D.C. 54, 212 F.2d 236, 241 (D.C.Cir.), cert. denied, 347 U.S. 1015, 74 S.Ct. 870, 98 L.Ed. 1137 (1954); Gebhard v. United States, 422 F.2d 281, 287–88 (9th Cir. 1970); Behrle v. United States, 69 App. D.C. 304, 100 F.2d 714, 715–16 (1938). It was not necessary for the government to bring forth an admission by Chapin as to what he thought the question meant at the time he answered it in order for the jury to make that determination.

In the light of these considerations, we take up the two questions. As to the first, Chapin maintains on appeal that he thought the questioner was interested in whether he knew that Segretti had *personally* distributed any campaign literature, in the sense of passing it out on a street corner or from house to house. While Segretti testified at the trial that he actually had, contrary to Chapin's instructions, passed things out to "consumers" directly, he also stated that he had not told Chapin of these instances, and there was no indication that Chapin had found out about them otherwise. Under the meaning appellant now puts forth, his response was true. However, we cannot reverse the jury's verdict on this theory.[5]

Segretti testified during the government's case in chief that he and Chapin had discussed several items which Chapin knew Segretti had started through usual distribution channels. (Since Segretti often issued false press releases or baggage calls rather than flyers, as Chapin well knew, the items would in no event have to be passed out on street corners in order to be effectively distributed.) For example, Segretti testified that, with respect to the Jackson-Humphrey letter, "Mr. Chapin inquired how much it had cost me to have this letter distributed and I told him $20.00. He stated that for that amount of money I received ten or fifteen or twenty thousand dollars worth of free publicity and he told me to be careful that I didn't get caught." (Tr. 307). He also testified as

5. Appellant has argued that the jury's acquittal on the "discussed the distribution" part of Count I necessarily requires acquittal on the "know about the distribution" part of the count. This position totally ignores the possibility that Chapin could have found out about Segretti's activities in any number of ways other than by discussing them with Segretti—notes from Segretti, the press, statements of others.

to his discussion with Chapin about the printing of the large Day-glo orange Muskie busing poster (Tr. 288). The Government introduced, through John Dean, an "Eyes Only" memorandum written by Chapin on November 5, 1972, before his grand jury appearance, in which Chapin stated that "It is my feeling Don did the 'Sex News Release' on Jackson and Humphrey and tried to tie it to Muskie's people. . . . He also put out countless press releases about events—scheduled and non-scheduled. . . . I believe it was Don who had [pro-Muskie] cards passed out at Wallace rallies." (Joint Appendix 342–43) The Government showed Chapin's motive to lie about the question through Dean's testimony that he had told Chapin that the latter's only possible criminal liability was for "causing to be distributed" non-attributed campaign literature (Tr. 421) *see* 18 U.S.C. § 612 (1970), and through proof that Chapin had lied on the same subject to the FBI (Tr. 444, 447). Chapin's grand jury testimony itself, introduced as Government's Exhibit 1, showed that while appellant readily admitted innocuous "pranks," he steadfastly refused to admit any knowledge about the one item—campaign literature—he feared could lead to his prosecution. The grand jury testimony also contains Chapin's own use of the word "distribution" in a context which does not involve passing items out at street corners. (G. Ex. 1 at 27) These items, coupled with the fact that the usual meaning of the word "distribute" is simply to pass on to others, which Chapin clearly knew Segretti did, were certainly sufficient so that a reasonable juror could have fairly found, beyond a reasonable doubt, that Chapin knew that the true answer to the question as asked, at the time it was asked, was "yes",—and that he wilfully lied. *See* Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229, 232 (1946), cert. denied, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947).

Chapin's defense, if anything, further undermined his case. He admitted his concern with possible criminal liability for the distribution of campaign literature, and his "misstatements" to the FBI on that subject. He also stated that he knew that Segretti did not keep the items he produced to himself and that several of them had become widely publicized. Most important, while he was never asked what he thought this question had meant during the grand jury hearing, Chapin did provide the court with his own definition of distribution—"the method by which something goes from the point of production to the hands of the consumer. It deals with the channels by which it goes, the economics of how it is handled, how it is merchandized, that kind of a context." (Tr. 553) While Chapin also denied the statement to Segretti about the Jackson-Humphrey release, the totality of the evidence at the close of the testimony was strong enough to require the judge to send the case to the jury. On this basis, the jury's verdict on Count I must stand.

Defendant attacks Count III (the "single or particular candidate" question) on three grounds in addition to the vagueness argument discussed above.[6] First, he says that the question was an improper compound question, asking whether Chapin had ever expressed an interest *or* given any instructions or di-

6. As indicated *supra*, "express any interest to him" or "give him any directions or instructions" are not too vague in themselves to be a predicate, in the context, for a jury's finding that appellant knowingly gave a false answer.

rections, and that the government failed to prove which question Chapin answered. We note first that this argument is new on appeal—in the District Court, Chapin consistently treated the question as a single entity. His entire defense on this count related to his understanding that the questioner wanted to know whether Chapin had focused his attention on one candidate to the exclusion of others. He made no effort, from pre-trial to his closing argument to the jury, to indicate that he might have been confused about which question to answer. And Chapin made no mention of this possibility in his own testimony. He did not, finally, request a jury instruction which would have specifically required the government to prove which branch of the question he was answering.

An examination of the question lends support to this original position. The question here asks for only one bit of information; using two analogous phrases in the same question was nothing more than a rhetorical flourish. In this situation, especially where the jury charge emphasized the requirement that the government prove that the defendant knew his answer was false when he gave it (necessarily requiring the jury to determine what question the defendant thought he was answering), we cannot say that there was impermissible speculation on the jury's part when it decided that Chapin knowingly responded falsely.

Second, Chapin argues that the evidence was insufficient to prove that he answered the question falsely. Proceeding from his vagueness argument, appellant states that the question meant to him, at the time posed, "Did you express any interest or give any directions or instructions with respect to a single or particular candidate *to the exclusion of all others*?" As with Count I, it is clear that Chapin had not given such instructions and that if this were in fact the meaning Chapin had given to the question, his answer was true. It was, however, shown by the Government in its case in chief that Chapin did at various times single out Senator Muskie as someone for Segretti to particularly concentrate on. For example, Segretti testified that at one of their first meetings, "He [Chapin] told me that Senator Muskie was the one that I should concern myself with primarily . . ." (Tr. 228) In addition, Segretti said, Chapin suggested several trips and engagements of Muskie which Segretti was to cover, and also requested that "it would be a good idea to perhaps get a rather disheveled looking individual and have him hold a sign [at a Nixon rally] that said something to the effect, 'Muskie for President.'" (Tr. 236). Of the three pieces of written instructions Chapin sent Segretti during the entire time he was operating, two dealt with suggestions on how to handle Senator Muskie. Finally, Segretti testified that he felt it necessary to ask Chapin in March 1972 whom he should concentrate on now that Muskie was no longer the front runner. He was told to "concentrate [his] efforts towards fostering a split between the staff or the candidates of Senator Humphrey and Senator Muskie." (Tr. 320–21) The only thing the defense brought out in cross-examining Segretti was that the overall plan had been to foster dissension; the specific instances of instructions about Senator Muskie were not denied.

At the close of the Government's case, then, the issue was whether Chapin's version of the question, in context, was reasonable enough that a jury would be left to speculate on which meaning of the question Chapin had in mind and so would be unable to determine whether

he had knowingly answered the question falsely. *See* United States v. Wall, *supra*, 371 F.2d at 400. The placing of the question is important in this connection. The particular inquiry came at the close of a series of questions about reports he had received from Segretti, and he had stated that he had received information about all the Democratic contenders. Earlier in his grand jury statement, Chapin had described Segretti's assignment as doing "competitive checks on various possible presidential candidates during the primary season." With the grand jury questioning in that posture, a jury could find that the specific question at issue could not have reasonably been interpreted to ask whether Chapin had countermanded the prior orders to harass all the candidates, but that its purpose was rather to determine Chapin's role in some of the better-known "pranks" of that campaign, which were largely directed toward Muskie. If Chapin, knowing full well that Segretti was to torment all the Democratic candidates and that the questioners knew that too, really thought that this particular question suddenly asked whether the plan had been to "zero in" on one candidate to the exclusion of all others, he would not have responded so equivocally as he did, "Not *that I recall*" (emphasis added), but would probably have given a flat and emphatic negative. This was too central a matter not to be clear in his mind. *See* Behrle v. United States, *supra*; Gebhard v. United States, *supra*; United States v. Nicoletti, 310 F.2d 359, 361–63 (7th Cir. 1962), cert. denied, 372 U.S. 942, 83 S.Ct. 935, 9 L.Ed.2d 968 (1963). Giving the benefit of inferences to the government, Curley v. United States, *supra*, 160 F.2d at 232, it is fair to say that the prosecution had sufficiently shown that Chapin's answer was knowingly false under the only reasonable interpretation of the question—that it asked for information about directions about and interest in a specific candidate while recognizing that the overall plan was to create dissension among all candidates.

[9, 10] In defense, Chapin stated that his thought when he answered the question was "only that there was no master plan against any particular candidate that Mr. Segretti dealt with. That was the only thing." (Tr. 513). The defense aiso emphasized that there had been no followup questions dealing with specific candidates, but this could mean that the prosecutors were successfully misled by Chapin rather than that the question dealt only with whether the original plan had been changed. As the court pointed out in *Lattimore*, neither the court nor the jury must accept as conclusive the meaning the defendant, after the fact, puts on a question. *Lattimore*, *supra*, 127 F.Supp. at 410 n. 21; *see* Seymour v. United States, *supra*, 77 F.2d at 584; United States v. Ceccerelli, *supra*, 350 F.Supp. at 478. Particularly when the entire case revolves around an assessment of defendant's credibility, we cannot require a trial judge to direct a verdict simply on defendant's assertion that he had an unusual meaning of the question in mind when he responded. It should not be forgotten that Chapin's major interest, in testifying before the grand jury, was to keep himself from being accused of possible violations relating to campaign literature.

Chapin's final point with respect to Count III is that his lack of recollection was not sufficiently proven. Of course, in the absence of a statement by the defendant, the falsity of an "I don't recall" answer must be proven by circumstantial evidence. This does not mean that proof is impossible. As an-

other court has stated, "The jury must infer the state of a man's mind from the things he says and does. Such an inference may come from proof of the objective falsity itself, from proof of a motive to lie, and from other facts tending to show that the defendant really knew the things he claimed not to know" or recall. United States v. Sweig, 441 F.2d 114, 117 (2d Cir.), cert. denied, 403 U.S. 932, 91 S.Ct. 2256, 29 L.Ed.2d 711 (1971); *see* American Communications Ass'n v. Douds, 339 U.S. 382, 411, 70 S.Ct. 674, 94 L.Ed. 925 (1950); Gebhard v. United States, *supra*, 422 F.2d at 287–88. Here, once the jury rejected Chapin's version of the question, the evidence showed a large number of instructions about Senator Muskie over a six-month period, including the only two substantive written instructions Chapin had given Segretti. In addition, Chapin's obvious desire before the grand jury and the court to put himself as far as possible from the specifics of Segretti's campaign provided sufficient evidence of his motive to conveniently omit recollection of any specific instructions. There was, in short, enough evidence to allow the jury to determine whether Chapin had in fact forgotten the instructions he gave, and the jury verdict on Count III must therefore also be affirmed.

III.

Relying on the principle that relevant evidence may be excluded if it is likely to have an unduly prejudicial effect on a jury, appellant contends that the admission of the Jackson-Humphrey "sex" release and the Chisholm release was error in that the items could so prejudice the jury that Chapin would be convicted for hiring the man who put out the statements rather than for lying to the grand jury. We agree, of course, with the basic principle, as we have reiterated several times recently, *see* United States v. Cockerham, 155 U.S.App.D.C. 97, 476 F.2d 542, 545 (1973); United States v. Marcey, 142 U.S.App.D.C. 253, 440 F.2d 281, 284 (1971), but we do not think it an abuse of the trial judge's discretion to admit the material here.

The items involved were relevant mainly to the portion of Count I on which Chapin was acquitted. That dealt with the following exchange:

> Q. Did you ever discuss in any way with Mr. Segretti the distribution of any campaign literature or statements of any kind?
>
> A. No.

The defense on this part of the count, unlike that on the second part, was that there had never been any such discussion, not that the word "distribution" was limited to street-corner efforts by Segretti. (Tr. 698). The only three items about which Segretti was able to testify that there had been any specific discussion were the busing poster, the Jackson-Humphrey "sex" letter and the Chisholm release. (Tr. 288, 307, 326–27). These documents were clearly relevant to prove that, if there had been such discussion as Segretti contended, Chapin would, because of the nature of the items, have remembered and therefore would have *knowingly* answered the question falsely. Because of the limited number of items about which Segretti was able to give specific testimony, there was very restricted opportunity for proving through documents that the denial was knowingly false.

The prejudicial impact of the documents comes, of course, from their vile and spectacular nature, coupled with the fact that the Chisholm release was directed against the only black or female candidate in the race. Particularly since

no one contended that Chapin had written the pieces or had any knowledge of them before they were distributed, he says that the prejudice outweighed the relevance.

The trial judge was cognizant of the problem and carefully balanced the factors. On the voir dire, he checked on this matter, covering both the purely offensive and the racial aspects of the material, asking whether any jurors would allow the items to interfere with their objectivity. Two jurors responded, both were privately questioned, and both were excused. That some jurors were able to admit openly the possibility that they could not be objective lends credence to the implication that the others, by their silence, truly believed that they would not be influenced. *Cf.* United States v. Liddy, 167 U.S.App.D.C. ——, 509 F.2d 428, 437 (1974). Then the judge held off ruling on the admissibility of the documents until he saw how they fit into the Government's case. When these items were admitted (after further careful reflection by the court), the judge gave the jury a cautionary instruction, reminding them of the voir dire and stating "I simply want to remind you that the issue is . . . whether or not the statements of Mr. Chapin are true or false as set out in the indictment, and there is no question of whether you agree or disagree or approve or disapprove of the contents of this kind of material." (Tr. 329). The caution was also repeated, though in less pointed terms, during the charge to the jury.

The material was far less inflammatory than evidence we have sustained against similar charges in the recent past. In *Cockerham*, for instance, descriptions of the sexual molestation and murder of a seven-year old girl were held admissible even though the defendant admitted the acts and relied solely on the insanity defense. 476 F.2d at 545. In *Marcey*, where the defendant was charged with killing his wife and similarly did not deny the act, we approved the admission of pictures of the wife after a beating by defendant, some six months prior to the crime. 240 F.2d at 284. The one case in this circuit to which defendant cites us in which we overturned a conviction because overly prejudicial evidence had been admitted involved evidence of a possible murder by a defendant charged with failure to register as a foreign agent. Frank v. United States, 104 U.S.App.D.C. 384, 262 F.2d 695 (1958). The court there found "the probative value of the evidence about the [murder] too slight and its prejudicial tendency too great to justify its introduction." *Ibid.* at 697. Here, given the need for proof of the "discuss" part of the first count, the trial court's careful weighing of the evidentiary and prejudicial values of the items, the voir dire on this subject, the cautionary instructions, and the jury's decision to acquit defendant on the charge to which the items were most relevant, we are of the opinion that the trial judge did not abuse his discretion in allowing the material into evidence.

IV.

[15] Chapin's final argument is that, because of the nature of the case and prejudicial pre-trial publicity, he could not get a fair trial in the District of Columbia, where the crime was committed, and his motion for a change of venue should have been granted. The standard for granting a request for a venue change is laid out in Rule 21(a), F.R.Crim.P.: "that there exists in the district where the prosecution is pending so great a prejudice against the defend-

ant that he cannot obtain a fair and impartial trial . . . ." However, as the court stated in Jones v. Gasch, 131 U.S.App.D.C. 254, 404 F.2d 1231 (1967), cert. denied, 390 U.S. 1029, 88 S.Ct. 1414, 20 L.Ed.2d 286 (1968), " 'The ultimate question' on such a motion 'is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the *voir dire* examination.' " 404 F.2d at 1238.[7] We emphasize that, except for the disallowance of two questions (discussed *infra*), Chapin does not challenge either the actual voir dire or the manner in which it was carried out, which was in accordance with the procedures approved in United States v. Bryant, 153 U.S.App.D.C. 72, 471 F.2d 1040 (1972), cert. denied, 409 U.S. 1112, 93 S.Ct. 923, 34 L.Ed.2d 693 (1973). In addition, Chapin never requested that the court consider the lesser remedy of granting a continuance to allow publicity to die down, and it does seem that appellant's trial, coming after the hearings before the Senate Select Committee (the Ervin Committee) had concluded and before those by the House Judiciary Committee had begun, "was at a less unpropitious time than any that has succeeded it, or [was] likely to follow." United States v. Dennis, 183 F.2d 201, 226 (2d Cir. 1950), aff'd, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).

There are two distinct branches to Chapin's venue argument. The first is that because of his connection with the Nixon administration and his participation in a "dirty tricks" campaign aimed at Democratic candidates and with racial overtones, a truly fair and impartial jury could not have been drawn from the District's heavily black, and overwhelmingly Democratic, population. In support of his contention, appellant offered an affidavit from Dr. Elvin Mackey, Jr., Director of Minority Group Program Development of the American Psychiatric Association. Dr. Mackey stated that, because the heavily-black District had been denied home rule and because of the Nixon administration's policy of "benign neglect," prospective black jurors would have a "normal human reaction" of hostility toward the Nixon administration and those associated with it—coupled with a tendency to suppress such feelings when asked about them. In rebuttal, the Government's examination of Dr. Mackey

7. In *Jones*, we discussed some of the reasons why a judge may properly defer ruling on a motion for change of venue until after voir dire:

> "It is then, and more usually only then, that a fully adequate appraisal of the claim can be made, and it is then that it may be found that, despite earlier prognostications, removal of the trial is unnecessary. Jurors manifesting bias may be challenged for cause; peremptory challenges may suffice to eliminate those whose state of mind is suspect. Frequently the problem anticipated works itself out as responses by prospective jurors evaporate prior apprehensions." 404 F.2d at 1238–39 (footnotes omitted).

Since that opinion was written, the ABA Standards on Fair Trial and Free Press, requiring that motions for venue changes be disposed of before voir dire, have been approved. ABA Standards, Fair Trial and Free Press § 3.2(d) (1968). We are not ready to find that the logic of the *Jones* case should be put aside, as a routine matter, to conform to the ABA standards. Where community passions are high or publicity both localized and virulent, it might well be that a court would carefully consider whether the defendant should even be required to prepare for a trial before a predictably hostile jury, and not automatically hold off ruling on the motion until voir dire. However, we are also of the opinion that in this case, which does not present such a situation, the logic of *Jones* still holds. We note that no circuit has as yet adopted this part of the ABA Standards as routine.

showed that he had not lived in the District from 1962 to 1972, that he had not conducted any empirical studies about the attitudes of District residents as to which he had testified, nor had he consulted the studies of others, and that he had never attended a voir dire and was somewhat confused about the whole procedure.

The American Bar Association Standards on Fair Trial and Free Press state that proof of prejudice sufficient to require a change of venue may be made by "qualified public opinion surveys . . . as well as other materials having probative value." ABA Standards, Fair Trial and Free Press § 3.2(b) (1968). There may be situations in which, apart from any prejudicial publicity, prejudice against a defendant is so great and so obvious that, even with the opportunity for a probing voir dire (as was the case here on feelings toward the Nixon administration and those connected with it), academic sociological statements will be sufficient, in the absence of affidavits by members of the community or public opinion surveys, to convince a court that a fair trial is impossible in the District of Columbia. However, along with the trial court, we cannot say that this is such a case. Chapin's role in both the administration and the wrongdoings in which it was engaged was small; testimony on his behalf at trial emphasized that his job was almost entirely administrative with no policy responsibilities. The crime with which he was charged was not, unlike that to which Segretti pled guilty, directly related to anti-Democratic activities. Dr. Mackey's testimony in no way recognized that there might be a distinction between a potential juror's feelings as to Richard Nixon himself and one of his minor functionaries. Neither Dr. Mackey nor appellant seem to have taken cognizance of the fact that, while there may be more blacks on District of Columbia juries than on juries in other federal district courts, juries in this city are not all black, and the jury in this case was in fact split almost evenly along racial lines. Finally, the jury did acquit on substantial parts of the indictment. On this first branch of Chapin's venue argument, then, the proof presented was not nearly sufficient for us to overturn a decision within "the sound discretion of the trial court." Estes v. United States, 335 F.2d 609, 614 (5th Cir. 1964), cert. denied, 379 U.S. 964, 85 S.Ct. 656, 13 L.Ed.2d 559 (1965).[8]

The second branch of Chapin's venue argument revolves around pre-trial publicity. Citing the *Rideau*,[9] *Marshall*,[10] and *Sheppard*[11] cases, appellant asks us to find that publicity about him and his activities was so great that it was unlikely that a jury able to put aside prejudices and decide the case on the basis of the evidence before it could be empaneled.[12] While the argument is that no

8. Since appellant's trial, two District of Columbia trials of persons associated with the Nixon administration have resulted in acquittals. United States v. Mitchell et al., Cr. No. 74–110 (D.D.C.) (acquittal of Kenneth W. Parkinson, attorney for the Committee to Reelect the President, on charges of obstruction of justice); United States v. Connally, Cr. No. 74–440 (D.D.C.) (acquittal of John Connally, former Secretary of the Treasury, on charges of accepting a bribe).

9. Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963).

10. Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

11. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

12. The jury here was sequestered, and there was no indication that any during-trial publicity reached them. This distinguishes the case from *Sheppard* and *Marshall* where prejudicial

voir dire would have been effective in rooting out the prejudices of which Chapin complains, a brief description of the actual questioning will put the claim in perspective. The judge initially made it clear to the jurors that Chapin was not charged with participating in either the Watergate break-in or the cover-up, and stated that he had not been involved in such activities. Even so, he asked several questions of the panel about their knowledge of the entire Watergate affair. Jurors who had simply heard of the matter were not further questioned but the several who indicated that they had definite feelings about those "caught up" in Watergate were individually questioned and those who said they had a definite opinion about the defendant or those he worked with were excused. The judge then inquired which jurors had ever heard of Chapin or the present case. All talesmen who responded affirmatively were individually questioned as to exactly what they had heard, whether they had formed any opinion about the defendant's guilt or innocence and whether they could serve fairly. (Compare the procedure we recently approved in United States v. Liddy, *supra*.) While it is difficult to get exact numbers from the record, it appears that of the 120 prospective jurors on the two panels, at the most 22 veniremen had heard of either Chapin or the case. In just about every instance, on further questioning the knowledge of the jurors turned out to be simply that the trial was about to take place. Most did not know what appellant was charged with, and no one appears to have formed a definite opinion of his guilt or innocence (although several jurors voiced strong opinions about others, such as Messrs. Haldeman, Erlichman, Dean and Hunt). These results on voir dire were a far cry from those in any of the cases cited by appellant. *Compare* Rideau v. Louisiana, *supra*, __ U.S. at 725, 83 S.Ct. 1417 (3 members of petit jury had seen defendant's televised confession); Marshall v. United States, *supra*, 360 U.S. at 312, 79 S.Ct. 1171 (seven members of jury read, during trial, newspaper accounts of items court had ruled too prejudicial for admission as evidence); Sheppard v. Maxwell, *supra*, 384 U.S. at 354 n. 9, 86 S.Ct. 1507 (all but one juror had read something about case; publicity extensive and virulent both pretrial and during trial before unsequestered jury). *See also* Irvin v. Dowd, 366 U.S. 717, 727–28, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) (90% of veniremen, and 8 jurors had opinion of defendant's guilt); Silverthorne v. United States, 400 F.2d 627, 635–40, 644 (9th Cir. 1968) (all veniremen had heard of case, 9 had definite opinions as to guilt of defendant; court did not voir dire jurors as to what they had heard of case; case remanded to same district for retrial).

As the ABA standards note, a decision whether to grant a change of venue can be based "on the court's own evaluation of the nature, frequency, and timing of the material involved." ABA Standards, Fair Trial and Free Press § 3.2(c) (1968). In addition, firm precedent demands that the court take into account whether the publicity is sufficiently localized that potential jurors in another area would be free of any taint from exposure to the press, enabling the change to serve its purpose. *See* United States v. Dennis, *supra*, 183 F.2d at 226;

information reached the jurors during trial. The harmful effect of indiscriminate publicity on a jury already empaneled and hearing the case under the rules of evidence, is inherently different in kind and degree from the pre-trial publicity in this case.

Application of Cohn, 332 F.2d 976, 977 (2d Cir. 1964); United States v. Bando, 244 F.2d 833, 838 (2d Cir.), cert. denied, 355 U.S. 844, 78 S.Ct. 67, 2 L.Ed.2d 53 (1957); United States v. Mitchell, 372 F.Supp. 1239, 1261–62 (S.D.N.Y.1973). In considering this aspect of the motion, several courts have suggested that a venue change is usually more effective if it is to a more, rather than less, metropolitan community because a big case in a small town quickly becomes a *cause celebre* and the focus for substantially more publicity than existed at the time the decision to transfer was made. United States v. Dioguardi, 428 F.2d 1033, 1039 (2d Cir.), cert. denied, 400 U.S. 825, 91 S.Ct. 50, 27 L.Ed.2d 54 (1970); Application of Cohn, *supra*; United States v. Mitchell, *supra*, 372 F.Supp. at 1261; *cf.* Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379, 383 (9th Cir.), cert. denied, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99) (1962) ("size and general news inundation" of community supports denial of change of venue). *See also* ABA Standards, Fair Trial and Free Press at 121 n. 95 (1968). Appellant here desired a transfer of the case to a more rural community, suggesting the Southern District of Iowa as appropriate.

Our own scrutiny of the publicity in the community about appellant prior to the trial, *see* Sheppard v. Maxwell, *supra*, 384 U.S. at 362, 86 S.Ct. 1507, convinces us that the trial judge was correct in refusing to allow the transfer. While appellant's upcoming trial attracted some newspaper attention, the articles were not front-page stories, frequently mentioned the trial only in passing, and a large number concentrated on John Dean's role as a witness rather than Chapin's role as defendant. Those stories which were exclusively about the trial were factual accounts of motions filed by the defendant and proceedings in open court. Editorial comment, to the extent there was any, was essentially sympathetic, deploring the possibility that of all the White House staff members, only Chapin, and not those more responsible for Watergate and the cover-up, was likely to be brought to trial and convicted. In addition, the publicity was at its height during January and February, 1974, and had decreased substantially by the time of trial in April. The Washington Post appears from the record to have carried no story about the trial the day it started.

Rather than the cases cited by appellant, we think the situation here more resembles that in some less celebrated cases, such as the larceny trial of Teamsters president Dave Beck. Reviewing the publicity there, the Supreme Court found: "The news value of the original 'disclosures' was diminished, and the items were often relegated to the inner pages. Even the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness. If there was a campaign against him as petitioner infers, it was sidetracked by the appearance of other 'labor bosses' on the scene who shared the spotlight." Beck v. Washington, 369 U.S. 541, 556, 82 S.Ct. 955, 963, 8 L.Ed.2d 98 (1962). *See also* Northern California Pharmaceutical Ass'n v. United States, *supra*; United States v. Medlin, 353 F.2d 789, 792 (6th Cir. 1965), cert. denied, 384 U.S. 973, 86 S.Ct. 1860, 16 L.Ed.2d 683 (1966). The *Beck* case was reviewed under a standard which required a showing of prejudice to overturn the denial of a change in venue. 369 U.S. at *ibid.*, 82 S.Ct. 955. In the later, more sensational

Sheppard, Rideau, and *Estes*[13] cases, the Court did not require such a showing. We are of the opinion, however, that where publicity has not been virulent and sensational, where the community in which the trial is scheduled is large and inundated with other news, where the publicity is nationwide rather than local (appellant uncovered a substantial amount of publicity about Segretti and Chapin even in the Southern District of Iowa), where the jury is thoroughly questioned about what they have read and its effect, and where the jury is then sequestered, some showing of prejudice is required to overturn the trial court's reasoned decision. *See* Murphy v. Florida, — U.S. —, —, 95 S.Ct. —, 44 L.Ed.2d — (1975); Jones v. Gasch, *supra*, 404 F.2d at 1242. Appellant has made no such showing, nor is it likely that he could in view of the jury's verdict of acquittal on a substantial portion of the charges.

[21] As for the voir dire questions which the judge refused to ask, we hold that he was well within his bounds. These questions concerned the voter registration of potential jurors over the past four years. As part of the court's voir dire, jurors were asked whether they believed that their own connection or that of a close friend or relative with a political party, particularly during the 1972 Presidential campaign, would prejudice them for or against the defendant and whether anyone or members of their families had worked in the 1972 campaign for the Committee to Reelect the President. At the close of this voir dire, the court asked counsel for additional questions. Chapin's counsel replied "I can see the reason why Your Honor has not gone into political views, but, from the point of view of our position, we would stand on the questions as submitted." (Tr. 131) The judge stated that he thought he was constitutionally barred from asking the questions.

Looking at the list of questions submitted by appellant on "political alignment", we can understand the court's position. The list contains nine questions, one of which was asked by the court as part of its own voir dire. Six of the other questions might in fact raise First Amendment problems, in that they asked who jurors had voted for, which political parties they had contributed to, worked for, etc. *Cf.* NAACP v. Alabama, 357 U.S. 449, 461–62, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). We have been cited to one case in which this problem is discussed. In Connors v. United States, 158 U.S. 408, 15 S.Ct. 951, 39 L.Ed. 1033 (1895), involving a charge of tampering with a ballot box, the requested questions were similar to those presented here. Affirming the conviction against a charge that defendant did not have the opportunity to help select an impartial jury because of the limited voir dire, the Court stated that questions about political affiliation should be disallowed, even in a case involving politics, except where preliminary questioning, such as that conducted here, had indicated that a potential juror "might, or possibly would, be influenced in giving a verdict by his political surroundings." *Ibid.* at 415, 15 S.Ct. at 953. There were no such indications with regard to the jurors here.

It is possible that, because of changes in election laws since *Connors*, the two questions specifically pointed out by Chapin on this appeal, relating to voter registration rather than actual voting, should have been asked. In the District of Columbia, voter registration lists by party are now compiled and are public.

13. Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

It would even have been possible for Chapin's attorneys, armed with the list of names and addresses of veniremen, to get part of the information directly from the Board of Elections. In these circumstances, the constitutional basis for denial of these particular questions is not as clear as for the others. As noted above, however, these two "registration" questions were buried in a list of much more questionable ones, and counsel at the trial did not, when faced with the judge's reasons for denying all the questions, single out these inquiries as permissible. In this situation, and especially since there was a substantial voir dire on political bias and prejudice, we cannot say that the trial judge abused his discretion in denying the list of political questions, including those only now highlighted, as a whole. *Compare* Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) (no questions asked about racial prejudice despite clear defense request).

Affirmed.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

For the Court

Hugh E. Kline
Clerk

Date: July 14, 1975
Opinion for the Court filed by Judge Davis

SUPREME COURT, U. S.
FILED
APR 8 1975
MICHAEL RODAK, JR., CLERK

No. 75-501

In the Supreme Court of the United States

OCTOBER TERM, 1975

DWIGHT L. CHAPIN, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES F. C. RUFF
Special Prosecutor

Watergate Special Prosecution Force
315 Ninth Street N.W.
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-401

DWIGHT L. CHAPIN, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner contends that the questions which formed the predicate for this conviction for making false material declarations before a federal grand jury were impermissibly vague, even though the trial jury found that his answers were knowingly and willfully false under *all* reasonable interpretations of the questions, as well as under the interpretations actually held by petitioner at the time he gave his answers. Furthermore, while an exhaustive *voir dire* examination of prospective jurors failed to reveal any significant awareness of petitioner or any possible bias against him, he asserts that he was improperly tried because of pre-trial publicity and the racial composition of Washington, D.C. He also claims that the trial judge erred in not asking questions to elicit details of the political beliefs of prospective

jurors. Although we rely primarily on the thorough and considered opinion of the court below, we summarize here our basic position.

STATEMENT OF THE CASE

An indictment filed on November 29, 1973, charged petitioner, Dwight L. Chapin, with four counts of making false material declarations before a grand jury in violation of 18 U.S.C. § 1623. Trial commenced before District Judge Gerhard Gesell and a jury on April 1, 1974, without any request being made for a continuance. Count Four was dismissed by the court at the close of the government's case, and on April 5, 1974, the jury returned its verdict, convicting petitioner on Counts One and Three and acquitting him on Count Two. On May 15, 1974, the court sentenced petitioner to two concurrent terms of imprisonment for ten to thirty months. The judgment of conviction was affirmed on July 14, 1975, by the United States Court of Appeals for the District of Columbia in a unanimous opinion. 515 F.2d 1274. Petitioner thereafter began to serve his sentence without seeking bail pending possible review by this Court.

1. On April 11, 1973, Dwight L. Chapin appeared before a grand jury investigating the activities of Donald Segretti concerning possible violations of federal statutes relating to the publication and dissemination of political campaign statements without proper identification of the persons or groups responsible for the statements. Chapin, while Appointments Secretary to the President, had recruited Segretti to play "pranks" on the various Democratic candidates to create dissension within the Democratic Party during the 1972 Presidential primaries campaign. It was hoped that the dissension would prevent the Party from coalescing behind its eventual nominee. During his testimony, Chapin falsely minimized his involvement with Segretti. Although he acknowledged recruiting Segretti, he denied any responsibility for, or detailed knowledge of, Segretti's specific activities.

2. The first count upon which the jury found that Chapin deliberately lied involved the following exchange:

> Q: To your knowledge did Mr. Segretti ever distribute any statements of any kind, or any campaign literature of any kind?
> A: Not that I am familiar with.

The government's evidence established that Segretti had printed and then distributed numerous pieces of fictitious campaign literature falsely ascribing certain positions to various Democratic candidates or associating the candidates with scandoulous and scurrilous statements. In accordance with instructions from Chapin, Segretti mailed a copy of each of the documents to Chapin (J.A. 139, 155, 165, 222-23),[1] and the two subsequently conversed about a number of them. For example, they discussed:

(a) cards handed out at a rally for Governor Wallace comparing Wallace to Hitler and urging people to vote for Senator Muskie (GX 12; J.A. 142-43, 331-32);[2]

(b) a news release on the stationery of Senator Muskie accusing Representative Chisolm of engaging in bizarre acts and alleging that she had been institutionalized for mental illness (GX 25; J.A. 170-72, 222, 338); and

(c) a press release issued on the stationery of Senator Muskie charging that Senators Humphrey and Jackson had been involved in sexual misconduct (GX 17; J.A. 158-62, 217, 220, 335).

Moreover, the evidence left no doubt that Chapin was aware that Segretti had been responsible for distribution of the materials. In their discussion of the so-called

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[1] "J.A." refers to the Joint Appendix in the court below.

[2] "GX" refers to Government Exhibit at trial.

"sex letter" (example (c) above), Chapin asked Segretti how much it cost to have the letter distributed. When Segretti told him that the cost was only $20, Chapin replied that the publicity was worth $10,000 to $20,000, but urged Segretti to be careful that he did not get caught. (J.A. 159, 217, 220.)

Chapin defended at trial on the ground that the question asked only whether he was aware of Segretti distributing the materials "personally" and that in fact Segretti either had mailed the documents or given them to assistants to hand out and had not himself handed them to the public. Chapin, however, never testified that he interpreted the question in this fashion at the time he answered the question before the grand jury and in fact testified at trial that he understood the word "distribute" to include "the method by which something goes from the point of production to the hands of the consumer. It deals with the channels by which it goes, the economics of how it is handled, how it is merchandized, that kind of a context" (J.A. 306).

3. Chapin's second conviction for perjury stemmed from the following exchange:

> Q: Did you ever express any interest to him, or give him any directions or instructions with respect to any single or particular candidate?
>
> A: Not that I recall.

The evidence demonstrated that on several occasions Chapin had told Segretti to concentrate on embarrassing Senator Muskie. For example, he told Segretti to arrange for disheveled looking persons to carry "Muskie for President" signs in anti-Nixon demonstrations (J.A. 113), to have people picket Muskie appearances in California with signs supporting other Democratic candidates, and to arrange for pickets at Muskie's home with signs raising the "Why not a Black Vice-President" issue (J.A. 119-21). When Chapin read in a White House news summary that Muskie had "maintained his cool" in

the face of hecklers at a Whittier College appearance, he ripped out the page, wrote a note on it, and mailed it to Segretti. The note read: "Don—We really missed the boat on this. Obviously the press now wants to prove the EM can keep his temper—let's prove he can't." (J.A. 130-31.)

DISCUSSION

1. The questions petitioner seeks to have resolved by this Court concerning the proper interpretation of 18 U.S.C. § 1623 are not presented by the record. Under the trial court's instructions [3]—instructions that were not challenged at trial or in the court below and are not challenged here (Pet. 13)—the jury was required to find beyond a reasonable doubt on each count on which it returned a verdict of guilty that the declaration in issue "was in fact false" under *all* "reasonable interpretations of the question" to which petitioner was responding. In addition, the jury had to determine, again beyond a reasonable doubt, "that [petitioner] at the time he answered knew the answer to be false." The jury specifically was charged that an answer is not "false" if "it is literally true and technically responsive."

Thus, the "defense of impreciseness" (Pet. 22) was fully available to petitioner, who could not have been convicted unless the jury found that he willfully gave false answer to the question as he understood it. In contending that the court below held that it is "enough to say that the imprecise questions are 'subject to a reasonable and definite interpretation by the jury'" (Pet. 23) petitioner ignores the court of appeals' reliance on the trial court's instructions on wilfullness, which required the jury to focus on the interpretation actually held by petitioner as well as on "objective" interpretations (Pet. App. 5a-6a). Contrary to petitioner's suggestion (Pet. 24, 25) the jury could not have ascribed to

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[3] The relevant instructions are set out in full in the Petition, pp. 12-13.

him an understanding that he did not in fact have, nor could it have convicted him "because he misunderstood which of several meanings the interrogator attached to his question or made a wrong guess as to which of several meanings the jury later thinks is the most reasonable interpretation."

Similarly, petitioner misrepresents the court's opinion in urging that the court held that vagueness cannot be raised as a defense when the vagueness first becomes "apparent" upon "ingenious scrutiny" of the questions and answers after the testimony in issue is given (Pet. 22-23). In fact, the court concluded that it was not necessary to decide "whether a conviction would be upheld if the government proved that the defendant was answering some possible-and-reasonable interpretation of the question but falsely answering the question as he himself interpreted it" (Pet. App. 5a).[4] Petitioner was afforded the opportunity of acquittal if his answer was literally true under *any* reasonable interpretation of the question, even if petitioner did not hold that interpretation at the time he testified.

In short, the decision of the court below was fully consistent with the principles established by this Court's decision in *Bronston* v. *United States*, 409 U.S. 352 (1973), and does not raise any novel or complex legal issues, much less issues that would warrant review by this Court. Thus, in seeking review here, petitioner in effect asks this Court to reappraise the court of appeals' conclusion that the evidence was sufficient to support the

[4] Petitioner's confusion apparently stems from the court's conclusion (clearly correct) that in the context of the purpose of the grand jury's investigation, which was known to Chapin, and the series of questions asked the questions were susceptible to a reasonable and definite interpretation. As the court noted, quoting from *United States* v. *Ceccerelli*, 350 F. Supp. 475, 478 (W.D. Pa. 1972), a different conclusion would bar all perjury prosecutions, because "[a]lmost any question or answer can be interpreted in several ways when subjected to ingenious scrutiny after the fact" (Pet. App. 5a).

jury's verdicts on each count on which petitioner was convicted (Pet. App. 7a, 9a-10a). Moreover, contrary to petitioner's bald assertion that this is the "first opportunity for this Court to chart the contours" of 18 U.S.C. § 1623 (Pet. 19), there have been numerous prosecutions under that section, and this is not the first time review has been sought in this Court.[5] See, *e.g.*, *United States* v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Ruggiero*, 472 F.2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). Indeed, prior cases, unlike this case, have involved the novel aspects of that section: the elimination of the two-witness rule and the recantation provision. See 18 U.S.C. §§ 1623 (d), (e).

2. It is readily apparent that the trial court applied long standing precedents of this Court in refusing to change the venue of petitioner's trial and, accordingly, that there is no reason for this Court to exercise its supervisory jurisdiction. Petitioner relies solely on the "inherent prejudice stemming from the totality of the Watergate publicity," but in *Irvin* v. *Dowd*, 366 U.S. 717, 722-23 (1961), which was reaffirmed last Term in *Murphy* v. *Florida*, 95 S.Ct. 2031, 2036 (1975), this Court firmly established that it is not necessary that "jurors be totally ignorant of the facts and the issues involved." A defendant receives a trial by an impartial jury when all jurors "can lay aside [any] impression or

[5] There is no conflict between the decision below and the decision in *Wall* v. *United States*, 371 F.2d 398 (6th Cir. 1967), or *Van Liew* v. *United States*, 321 F.2d 674 (5th Cir. 1965). As the court below noted, in *Wall*, unlike this case, there was no evidence to support a finding that the defendant's answer was false with respect to the more reasonable of two possible interpretations (Pet. App. 5a-6a). In *Van Liew*, the court held that the government was required to show that the question asked reasonably could be interpreted as urged by the government and that the defendant intentionally gave a false answer. The government met that obligation here, and the court's instructions required the jury to make the appropriate findings.

opinion and render a verdict based on the evidence presented in court."

After a thorough painstaking *voir dire* examination, which was not challenged on appeal, the trial court determined that none of the prospective jurors had an opinion of guilt. Of the 120 veniremen, at most 22 had heard or read about Chapin or this case. All were examined individually, and none had any fixed preconceptions. (J.A. 63-64, 68, 71.) Thus, nothing in the *voir dire* indicated a community "deeply hostile to the accused," *Murphy* v. *Florida*, *supra*, 95 S.Ct. at 2037, or a "pattern of deep and bitter prejudice," *Irvin* v. *Dowd*, *supra*, 366 U.S. at 727-28, that required the trial court to reject the jurors' sworn assurances that they could render fair and impartial verdicts based solely upon the evidence presented in court.

Moreover, the nature and impact of the publicity concerning petitioner was far different from that in cases like *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), where this Court has reversed convictions because of prejudicial pre-trial publicity.[6] As the court below analyzed the record (Pet. App. 15a):

> Our own scrutiny of the publicity in the community about appellant prior to the trial, *see Sheppard* v. *Maxwell*, *supra*, 384 U.S. at 362, 86 S.Ct. 1507, convinces us that the trial judge was correct in refusing to allow the transfer. While appellant's upcoming trial attracted some newspaper attention, the articles were not front-page stories, frequently mentioned the trial only in passing, and a large number concentrated on John Dean's role as a witness rather than Chapin's role as defendant. Those stories which were exclusively about the trial were factual accounts of motions filed by the defendant and pro-

[6] Even in *Sheppard*, the massive and highly inflammatory pretrial publicity directed at the defendant was not itself sufficient to lead this Court to conclude that Sheppard had not received a fair trial. 384 U.S. at 354-55, 358.

> ceedings in open court. Editorial comment, to the extent there was any, was essentially sympathetic, deploring the possibility that of all the White House staff members, only Chapin, and not those more responsible for Watergate and the cover-up, was likely to be brought to trial and convicted. In addition, the publicity was at its height during January and February, 1974, and had decreased substantially by the time of trial in April. The Washington Post appears from the record to have carried no story about the trial the day it started.

The court then concluded (Pet. App. 15a-16a):

> Rather than the cases cited by appellant, we think the situation here more resembles that in some less celebrated cases, such as the larceny trial of Teamsters president Dave Beck. Reviewing the publicity there, the Supreme Court found: "The news value of the original 'disclosures' was diminished, and the items were often relegated to the inner pages. Even the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness. If there was a campaign against him as petitioner infers, it was sidetracked by the appearance of other 'labor bosses' on the scene who shared the spotlight." *Beck* v. *Washington*, 369 U.S. 541, 556, 82 S.Ct. 955, 963, 8 L.Ed.2d 98 (1962) . . . The *Beck* case was reviewed under a standard which required a showing of prejudice to overturn the denial of a change in venue. 369 U.S. at *ibid.*, 82 S.Ct. 955. In the later, more sensational *Sheppard*, *Rideau*, and *Estes* cases, the Court did not require such a showing. We are of the opinion, however, that where publicity has not been virulent and sensational, where the community in which the trial is scheduled is large and inundated with other news, where the publicity is nationwide rather than local (appellant uncovered a substantial amount of publicity about Segretti and Chapin even in the Southern District of Iowa),

> where the jury is thoroughly questioned about what they have read and its effect, and where the jury is then sequestered, some showing of prejudice is required to overturn the trial court's reasoned decision. *See Murphy* v. *Florida*, —— U.S. ——, ——, 95 S.Ct. ——, 44 L.Ed.2d —— (1975); *Jones* v. *Gasch*, *supra*, 404 F.2d at 1242. Appellant has made no such showing, nor is it likely that he could in view of the jury's verdict of acquittal on a substantial portion of the charges.

Finally, petitioner totally ignores that a change of venue, the only relief he sought at trial, would have generated a tremendous amount of publicity in the transferee district. The court below properly considered this factor in upholding the trial judge's sound exercise of discretion in denying petitioner's transfer motion (Pet. App. 14a-15a).

3. In arguing that he could not receive a fair trial by a jury drawn from the predominantly black and Democratic citizenry of the District of Columbia, petitioner fails to take account of the factors that the court of appeals considered dispositive of his claims: (1) the "study" that petitioner submitted was not based upon empirical studies; (2) the jury in the case was nearly evenly split along racial lines; (3) petitioner was acquitted on substantial parts of the indictment; and (4) other "Watergate" defendants have been acquitted in the District of Columbia (Pet. App. 13a & n.8). As the court concluded: "the proof presented was not nearly sufficient [in light of the thorough *voir dire* on possible bias] for us to overturn a decision within 'the sound discretion of the trial court'" (Pet. App. 13a).

4. Finally, the court of appeals' discussion of the trial judge's failure to inquire as to the voting registration of the prospective jurors does not require elaboration. The court said (Pet. App. 16a-17a):

> It is possible that, because of changes in election laws since *Connors*, the two questions specifically

> pointed out by Chapin on this appeal, relating to voter registration rather than actual voting, should have been asked. In the District of Columbia, voter registration lists by party are now compiled and are public. It would even have been possible for Chapin's attorneys, armed with the list of names and addresses of veniremen, to get part of the information directly from the Board of Elections. In these circumstances, the constitutional basis for denial of these particular questions is not as clear as for the others. As noted above, however, these two "registration" questions were buried in a list of much more questionable ones, and counsel at the trial did not, when faced with the judge's reasons for denying all the questions, single out these inquiries as permissible. In this situation, and especially since there was a substantial *voir dire* on political bias and prejudice, we cannot say that the trial judge abused his discretion in denying the list of political questions, including those only now highlighted, as a whole. *Compare Ham* v. *South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) (no questions asked about racial prejudice despite clear defense request).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES F. C. RUFF
Special Prosecutor

November 1975

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OCTOBER TERM, 1975

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DWIGHT L. CHAPIN, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Government's Memorandum in Opposition succeeds only in obscuring the basic question presented in the Petition. That question is whether the *Bronston* principle—**"precise questioning is imperative as a predicate for the offense of perjury"** (409 U.S. at 362)—should be applied not only in the context of an unresponsive answer but also in the context of an ambiguous and imprecise question.

This case presents an opportunity to make certain that this new prejury statute, 18 U.S.C. § 1623, does

not become too tempting a vehicle for easy perjury indictments in situations where the prosecutors can find no other crime but nonetheless deem some sort of prosecution desirable. The final Report of the Watergate Special Prosecution Force, issued after the instant Petition was filed, reveals the intensity and scope of that problem.

And in light of the Government's Memorandum, one other question in the Petition stands unrefuted in terms of certiorari importance. That question was reserved 80 years ago in *Connors* v. *United States,* 158 U.S. 408, 415 (1895), and is now ripe for resolution. That question is whether, in the context of this political-type case, there was "some special reason" or some "extraordinary circumstances" requiring a *voir dire* as to the jurors' political affiliations.

I.

To begin with, the Government errs in denying (Memorandum, p. 7) the assertion in the Petition (p. 19) that this is the "first opportunity for this Court to chart the contours" of § 1623. None of the other petitions before this Court in prosecutions arising *in part* from § 1623 raised any *Bronston*-type questions as to the scope of this new statute; for the most part, those petitions raised entirely unrelated constitutional and procedural problems. See *Ruggiero* v. *United States,* No. 72-1300, 412 U.S. 939; *Kahn* v. *United States,* Nos. 72-1191, 72-1193, 411 U.S. 982; *Kerner* v. *United States,* Nos. 73-1650, 73-1651, 417 U.S. 976.

As to the instant case of first impression, an extension of the *Bronston* principle to the interrogator's question involves a three-step speculation on the part of

the jury in a perjury-type case. Logically, the jury must first assess what the interrogator had in mind when he asked the imprecise question. And then the jury must assess what the witness thought the interrogator meant, as well as what the question meant to the witness. In actuality, then, the jury must make a "triple guess" as to (1) the interrogator's intent, (2) the witness' interpretation of that intent, and (3) the witness' own interpretation of the question. Only then can the jury begin to determine if the witness' response was knowingly false.

Such "triple guessing" becomes impossible where the Government has not produced the interrogator at the trial to make clear what he meant in asking the question. That is why the *Van Liew* decision of the Fifth Circuit, 321 F.2d 674, 682-683, is so much in point and therefore so much in conflict with the result below. The Fifth Circuit there held that where the question is subject to more than one interpretation, the Government is obligated (1) to produce the interrogator to prove the meaning he attached to his own question, and (2) to prove that the witness knew "the sense in which the interrogator used the words," and nonetheless gave an answer which he knew to be false to the question "as thus put in the sense thus intended."

The Government here has not grasped the nature or significance of this vital problem; nor has it understood the reason why the *Van Liew* decision is so clearly in conflict. The Government seems content to rely on the thought (Memorandum, p. 6) that under the instructions to the jury the petitioner "was afforded the opportunity of acquittal if his answer was literally true under any reasonable interpretation of the ques-

tion, even if petitioner did not hold that interpretation at the time he testified."

The difficulty with that position, however, is that the jury's determination as to "any reasonable interpretation of the question" is only partly responsive to the necessities of this type of perjury prosecution. The kingpin in the Government's proof, where the ambiguity lies in the question rather than the answer, is to be found in the testimony of the interrogator himself—as the *Van Liew* case holds. That proof was simply not forthcoming in this case. We still do not know whether the prosecutor meant to ask (1) whether Chapin knew of any personal distribution by Segretti, or whether Chapin knew Segretti had caused others to distribute campaign literature, or (2) whether Chapin was interested in or gave directions with respect to a particular candidate to the exclusion of all others, or did so with respect to particular candidates included in the master plan. *Van Liew* requires that the Government supply the prosecutor's intent in those respects. And, however perfect the jury instructions may have otherwise been, *Bronston* teaches that a perjury prosecution or conviction cannot be premised on such unresolved ambiguities in the questions.

The Government's refusal to confront the obvious implications of the *Bronston* decision may well reflect its general antipathy toward the restraints which *Bronston* and other decisions have put on perjury prosecutions. The Watergate Special Prosecution Force's final Report reveals the Special Prosecutor's impatience with such restraints.

At page 36 of that Report, in complaining about "the exacting demands of a perjury prosecution," the

Special Prosecutor agonized over the imposition on the prosecutors of having "to search for a sequence of specific questions and answers that met the crime's narrow definition in order to bring a legally sustainable charge." Many such questions and answers, though "constituting the basis of possible perjury charges," had to be ignored since—to the dismay of the prosecutors—the questions and answers often "contained qualifying phrases and ambiguities which made it difficult to show that this definition had been met." And the *Bronston* decision was cited as an example of "recent judicial interpretations of the perjury statutes [that] have held that an evasive or misleading statement, even if made with the obvious intent to deceive the questioner, does not constitute perjury if it is literally true."

Grand jury proceedings have thus become the target of the prosecutors' "ingenious scrutiny" to find some question and answer into which the § 1623 crime of perjury might be poured. Unable to find other crimes with which to charge the witness, and hemmed in by the *Bronston*-type restraints on perjury charges, the prosecutors have been forced to read after-the-fact meaning into the ambiguous questions and falsity into the witness' response to what he thought the interrogator meant by the questions. And in bringing a § 1623 perjury prosecution based on such slender reeds, the prosecutors need only hope that the judge and jury will sweep away the imperfections and deficiencies in proof by saying, "Sorry, but under the instructions the witness must have known the proper or reasonable meaning of the ambiguous question; hence the witness must have knowingly lied."

Indeed, it is significant that the Government's Memorandum not once acknowledges that some ambiguity may lie in the prosecutor's questions. Nowhere in that Memorandum is there any indication that the burden was on the Government to prove what the presecutor here meant. Such a cavalier approach to this new perjury statute can only have a chilling effect on the ability or desire to speak freely—or indeed to testify at all—when one is called before a grand jury, without the benefit of counsel.

II.

In one other aspect, the Government's Memorandum has completely distorted the Petition. Contrary to the statement on page 1 of the Memorandum, the petitioner does not claim that the trial judge "erred in not asking questions to elicit details of the *political beliefs* of prospective jurors." Question 4 in the Petition (p. 3) raises the issue as to whether the judge erred in not inquiring "as to the *political affiliations and preferences* of the prospective jurors."

There is a world of difference between those two formulations. Suffice it to say here that the Government's reprint (Memorandum, pp. 10-11) of the lower court's opinion on the "political affiliations and preferences" question is totally unresponsive to the Petition's treatment of that opinion in terms of its certiorari importance. As stated in the Petition (p. 31), this Court in *Connors,* 158 U.S. at 415, indicated that there might be "some special reason" or "extraordinary circumstances" that would require a *voir dire* as to the jurors' political affiliations or party predelictions. And so, as the Petition stated (p. 31):

> "The refusal of Judge Gesell, on constitutional grounds, to question the prospective jurors as to their affiliations with the Republican or Democratic parties directly poses the *Connors* question. In the context of this case, are there what the *Connors* decision called 'exceptional circumstances' requiring the asking of such political questions? Do the factors here involved, such as the Watergate-related aspect of this case, the partisan political nature of the Segretti material, and the other political overtones of this prosecution, constitute 'exceptional circumsances' within the intent of the *Connors* ruling? Are there First Amendment or other constitutional reasons for barring such questions?"

The Government has simply not addressed its Memorandum to those certiorari-related questions.

CONCLUSION

For these additional reasons, the Petition should be granted.

Respectfully submitted,

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